1984

Foreign State Military Use of Another State's Continental Shelf and International Law of the Sea

Rex Zedalis

RUTGERS
LAW JOURNAL

Volume 16 Fall 1984 Number 1

FOREIGN STATE MILITARY USE OF ANOTHER STATE'S CONTINENTAL SHELF AND INTERNATIONAL LAW OF THE SEA†

*Rex J. Zedalis**

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† This Article, completed in May 1984, is in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University. Earlier drafts benefited from the insightful review of Oscar Schachter of Columbia University, W.T. Mallison, Jr. of George Washington University, and Bernard H. Oxman of the University of Miami, as well as several of my colleagues at the University of Tulsa. Responsibility for the views expressed is solely that of the author.

* Associate Professor of Law and Associate Director of the National Energy Law and Policy Institute, University of Tulsa College of Law. Cutting Fellow in International Law (1980-1981), J.S.D. candidate, Columbia University; LL.M., George Washington University, 1978; J.D., Pepperdine University, 1976; B.A., California State University, 1973. Attorney-Advisor, Foreign Agriculture Division, Office of the General Counsel, U.S. Department of Agriculture, 1978-1980; Research Associate, International and Comparative Law Program, George Washington University, 1978-1979; Office of the General Counsel, U.S. International Trade Commission, 1977-1978.

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I. INTRODUCTION

On May 20, 1984, the Soviet Union's Minister of Defense, Dmitri Ustinov, stated publicly that the Soviet Union had increased the number of ballistic missile launching nuclear submarines (SSBNs) patrolling the Atlantic and Pacific coasts of the United States.[1] Action of this sort had been threatened earlier by former Soviet leader Yuri V. Andropov and

1. Wash. Post, May 21, 1984, at A1, col. 4.

Marshall Nikolai V. Ogarkov, Chief of the Soviet General Staff, in response to the Reagan Administration's decision to proceed with scheduled deployments of Pershing II ballistic missiles and intermediate-range ground launched cruise missiles in the European theatre. Ogarkov had indicated that the Soviet Union would station additional Soviet SSBNs sufficiently close to permit them to hit targets in the United States as quickly as the new American missiles deployed in Western Europe could hit targets in the Soviet Union.[2] Though there has been no official indication of countermeasures the United States might take, there seems little doubt that one possible response would involve an acceleration in the activities of the United States' nuclear powered antisubmarine submarines (SSNs) in those ocean areas adjoining the continental United States. This response would not likely go unchallenged. Indeed, if the Soviets are to assure their SSBNs sufficient protection from American SSNs and accomplish the objective stated by Marshall Ogarkov they may deploy antisubmarine warfare (ASW)[3] weapons at various seabed locations. Since the most effective strategy of neutralization would involve engaging American SSN forces as far forward as possible, the Soviets would likely seek to deploy their ASW weapons on that portion of the seabed considered the continental shelf of the United States.

The interplay between the United States' announcements regarding the deployment of nuclear missiles and the reaction of the Soviet Union in this instance indicates that the continental shelf will attract the interest of Soviet military strategists. There are at least two other considerations which may well assure that this interest will focus on full scale foreign state military use of the continental shelf. The first of these arises from the vulnerability of the United States' intercontinental ballistic missile (ICBM) force to destruction by the Soviet Union.

As early as 1976, recognized authorities warned of the United States' ICBM force's[4] impending vulnerability.[5] Shortly thereafter various suggestions for enhancing the survivability of that force were advanced.[6]

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2. Allen & Polmar, *The Silent Chase: Tracking Soviet Submarines*, N.Y. Times, Jan. 1, 1984, 6 (Magazine), at 13, col. 1.

3. *See infra* text accompanying notes 31-45.

4. For the seminal work in this area, see Nitze, *Assuring Strategic Stability in an Era of Detente*, 54 FOREIGN AFF. 207 (1976). *See also* Editorial Comment, *Reflections on the Quarter*, 23 ORBIS 251, 253 (1979); Frye, *Strategic Build-Down: A Context for Restraint*, 62 FOREIGN AFF. 293, 296, 298 (1983-84).

5. *But see* Lodal, *Assuring Strategic Stability: An Alternative View*, 54 FOREIGN AFF. 462 (1976).

6. *See* Gray, *The Strategic Forces Triad: End of the Road?*, 56 FOREIGN AFF. 771, 785-86 (1978). Proposals included multiple aim point (MAP) basing modes using buried

These proposals, and others, have continued to receive priority consideration from President Reagan.[7] From all indications, however, full implementation of any proposal will stretch well into the balance of the 1980s.[8] During the interim period of strategic realignment — a period when the United States will be faced with the oft-talked about "window of vulnerability" — Poseidon and the soon to be operational Trident missile launching nuclear submarines[9] will be relied upon heavily[10] to deter excessive Soviet adventurism and the effects of nuclear gamesmanship.[11] Given that a greater number of targets in the Soviet Union can be brought within range the further seaward SSBNs of the United States are able to advance, it would seem logical that any concerted effort by the Soviet Union to minimize the devastation which the United States' submarine launched ballistic missile (SLBM) force could inflict must engage the Americans as far forward as possible. This will likely reinforce the interest of Soviet military strategists in using the United States' continental shelf to deploy military objects.

The second consideration arises from the possibility that the expressed interest of the United States in basing modern ballistic missiles on conventional powered submarines which cruise the waters above the Atlantic and Pacific shelves may eventually manifest itself in the form of actual deployment.[12] The United States may attempt to reconfigure the

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trenches, dispersed and hardened horizontal or vertical shelters, and ICBMs located in pools of water. In the summer of 1979, the Carter Administration was leaning towards the buried trench option. *See* Kaiser, *Complicated "Racetrack" Scheme Favored for Basing New MX Missile*, Wash. Post, July 26, 1979, at A3, col. 1.

7. Early in Reagan's first term, his administration expressed interest in a hardened basing mode which concentrated, rather than dispersed, ICBMs. Known as "densepack," *see* Drew, *A Political Journal*, THE NEW YORKER, May 9, 1983, at 48, the basing mode was not well received by Congress. In January 1983, President Reagan established the Scowcroft Commission which reported in April of 1983 that the most appropriate basing mode for new ICBMs, like the MX, should involve deployment in individual hardened silos. *See* Frye, *supra* note 4, at 298.

8. *See* Gray, *supra* note 6, at 786-87.

9. SENATE COMM. ON FOREIGN RELATIONS AND HOUSE COMM. ON FOREIGN AFFAIRS, 96TH CONG., 1ST SESS., FISCAL YEAR 1980 ARMS CONTROL IMPACT STATEMENTS 45 (Joint Comm. Print 1979) [hereinafter cited as 1980 ACIS].

10. *Id.* at 54.

11. As indicated in Section IV of this Article, the Soviet Union does not rely as heavily as the United States on its SSBNs to deter nuclear conflict or geopolitical maneuvering. Its nuclear force is based mainly on ICBMs, with SSBNs and long-range bombers comprising only a small percentage of its nuclear arsenal.

12. It also may be that the controversy in spring 1984 surrounding the lawfulness of mining operations undertaken by the United States Central Intelligence Agency in ports along the Nicaraguan coast suggests a growing interest in using ocean areas over which the coastal state has some type of jurisdiction for activities designed to exert political pressure

basing pattern of its nuclear deterrent by shifting the more powerful and technologically complex modern ballistic missiles — MXs — from land to nearby ocean areas.[13] It cannot be expected that the Soviets will remain unresponsive while the United States moves to enhance the survivability of its long-range nuclear arsenal. Deployment of new strategic missiles on small, conventional powered submarines designed to navigate the waters above the Atlantic and Pacific shelves, rather than in fixed, increasingly vulnerable land-based silos, would surely evoke some sort of countermeasure. The most likely may involve increased military use by the Soviet Union of the continental shelf subjacent to the waters in which the new submarines will navigate.

Obviously, from the above discussion, whether international law authorizes foreign state emplacement of military objects on another state's continental shelf is much more than just a matter of simple academic curiosity. International peace and world stability may well turn on the nature of the existing and the future legal regime governing such uses of ocean areas. There is a general consensus that the provisions contained in the Geneva Conventions of 1958[14] and the recently completed 1982 United Nations Convention on the Law of the Sea[15] prohibit foreign state emplacement of military objects in another state's internal and territorial waters.[16] With regard to both the navigable water column of the high seas

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concerning onshore political problems. Though based on the principles of international law relating to internal and territorial waters rather than to the continental shelf, there would seem to be no reason why this development would not add its own momentum to that already in existence concerning foreign state military use of another state's continental shelf. After all, it may be that military use of the shelf can be undertaken with fewer chances of detection than similar use of internal and territorial waters.

13. *See* Getler, *Hill Study of MX Missile Bases Tilt Toward Submarine*, Wash. Post, Sept. 10, 1981, at A5, col. 1; Greenberg, *Missiles at Sea*, Wash. Post, Aug. 7, 1979, at A19, col. 2.

14. Convention on the Continental Shelf, *done* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter cited as 1958 Continental Shelf Convention]; Convention on the High Seas, *done* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as 1958 High Seas Convention]; Convention on the Territorial Sea and Contiguous Zone, *done* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on Fishing and Conservation of the Living Resources of the High Seas, *done* Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

15. United Nations Convention on the Law of the Sea, *done* Dec. 10, 1982, U.N. Doc. A/Conf.62/122, 21 Int'l Leg. Materials 1261 (1982) [hereinafter cited as 1982 Convention on Law of Sea].

16. *See* Brown, *The Legal Regime of Inner Space: Military Aspects*, 22 CURRENT LEGAL PROBS. 181, 184 (1969); Gehring, *Legal Rules Affecting Military Uses of the Seabed*, 54 MIL. L. REV. 168, 181-84 (1971); Zedalis, *Military Uses of Ocean Space and the Developing International Law of the Sea: An Analysis in the Context of Peacetime ASW*, 16 SAN DIEGO L. REV. 575, 596-605, 630-37 (1979). The same prohibition does not

and its bed, however, most authorities recognize a rule of qualified freedom.[17]

Regarding the continental shelf, the prevalent view is that it is subject to the same proscriptive regime governing internal and territorial waters.[18] Over the years, however, voices have been raised in favor of authorizing foreign state emplacement of military objects on another state's continental shelf.[19] Recently the notion has developed that perhaps a proscriptive regime cannot be assumed. Indeed, the suggestion has arisen that there may very well be enough uncertainty to provide a foreign state with latitude to contend that such military utilization is supported by the basic principles of the international law of the sea. Because that suggestion substantially departs from the previously held beliefs and has been advanced by scholars of considerable stature within the international legal

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extend to such use of internal and territorial waters by the coastal state itself.

17. *See* M. JANIS, SEA POWER AND THE LAW OF THE SEA 85 (1976); M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 754-63, 769-73 (1962); Baxter, *Legal Aspects of Arms Control Measures Concerning the Missile Carrying Submarines and Anti-Submarine Warfare*, in THE FUTURE OF THE SEA-BASED DETERRENT 209, 221 (1973); Stoever, *The "Race" for the Seabed: The Right to Emplace Military Installations on the Deep Ocean Floor*, 4 INT'L LAW. 560, 563-64 (1970); Zedalis, *"Peaceful Purposes" and Other Relevant Provisions of the Revised Composite Negotiating Text: A Comparative Analysis of the Existing and the Proposed Military Regime for the High Seas*, 7 SYRACUSE J. OF INT'L L. & COMM. 1 (1979). The basic limitations on the right are reflected in the "reasonable regard" standard of Article 2 of the 1958 High Seas Convention, *supra* note 14, and the Hague Convention Relating to the Laying of Automatic Submarine Contact Mines, *done* Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541, 1 Bevans 669. The latter prohibits the use of physical-contact mines, unless they either become harmless within one hour after release or are anchored and become harmless if they break loose. The prohibition probably does not affect contact mines that are innocuous until automatically activated. However, even these may be subject to a requirement that they become harmless within one hour after activation. On the "reasonable regard" standard, see M. MCDOUGAL & W. BURKE, *supra*, at 769-73.

18. *See* E. BROWN, ARMS CONTROL IN HYDROSPACE: LEGAL ASPECTS 32 (1971); W. BURKE, TOWARDS A BETTER USE OF THE OCEAN 78 (1969); M. MCDOUGAL & W. BURKE, *supra* note 17, at 724; Gehring, *supra* note 16, at 188-94; Rao, *Legal Regulation of Maritime Military Uses*, 13 INDIAN J. INT'L L. 425, 447-49 (1973). For the proposition that military use of the shelf by the contiguous coastal state is permitted, see M. MCDOUGAL & W. BURKE, *supra* note 17, at 717.

19. *See* 23 U.N. GAOR C.1 (1605th mtg.) at 3-5, U.N. Doc. A/C.1/PV.1605 (1968) (comment of Soviet Union representative). Chichele Professor of Public International Law at Oxford University, the late D.P. O'Connell, reached the same conclusion. *See* 1 D. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 488 (1982); O'Connell, *Resource Exploitation, The Law of the Sea and Security Implications*, in NEW STRATEGIC FACTORS IN THE NORTH ATLANTIC 160, 167 (C. Bertram & J. Holst eds. 1977) [hereinafter cited as NEW STRATEGIC FACTORS]. *See also* Treves, *Military Installations, Structures, and Devices on the Seabed*, 74 AM. J. INT'L L. 808, 831-46 (1980). Professor Treves of the University of Milan served as the coordinator of the French language group of the Drafting Committee of the Third U.N. Conference on the Law of the Sea.

community, it merits sedulous scrutiny.[20]

The purpose of this Article is to examine each of the arguments supporting the view that international law may authorize foreign state emplacement of military objects on another state's continental shelf during peacetime.[21] To provide some perspective, the opening section briefly surveys current ASW technology. As will be apparent from that discussion, technology capable of permitting the emplacement of useful military objects on the continental shelf currently exists and continues to be improved with each passing year.

Following this survey, a section on legal principles analyzes the relevant provisions of the current law reflected in the Geneva Conventions of 1958. This section also analyzes the proposed 1982 United Nations Convention on the Law of the Sea. Four tentative conclusions emerge from this analysis. First, under current and future international law foreign states may, in principle, lawfully emplace military objects on another state's continental shelf. This results from the application of the doctrine of freedom of the seas to the bed of the continental shelf. Second, in those instances where foreign state emplacement and existing or ongoing coastal state activity conflict, the prevailing use is to be determined by balancing the values which each competing use attempts to advance. The 1958 Geneva Convention on the Continental Shelf does not expressly enjoin the use of this approach in the same manner as does the proposed 1982 United Nations Convention. Nevertheless, its appropriateness under current law seems demonstrated by its time-honored character and the consistency of its results. Third, in most conceivable instances, application of the balancing test prohibits even the very initiation of foreign state efforts to conduct military maneuvers or emplace military objects, irrespective of the

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20. Treves, *supra* note 19.

21. It should be noted that the question of lawfulness of foreign state military use during peacetime may arise in one of the following three contexts: (1) threat directed at the state whose shelf is being used; (2) threat directed at a third state rather than the state whose shelf is being used; (3) threat directed at a third state, but use of the shelf is occurring in accordance with consent of the contiguous coastal state. Principles discussed in this Article govern the legal relations between the foreign state and the coastal state in the first two situations just described. This Article does not deal with the legal relations between the coastal state and the third state in the last situation described, nor between the foreign state and the third state in the second and third situations. Matters of this sort are beyond the scope of the present inquiry because they fall within the provisions of the U.N. Charter governing the use of force and, perhaps, the Hague Convention of 1907 on Rights and Duties of Neutral Powers in Naval War, 18 Oct. 1907, 36 Stat. 2415, T.S. 545, 1 Bevans 723.

No attempt is made in this Article to address the question of whether international law permits a coastal state to use its own shelf for military purposes. The coastal state's right, however, is at least as extensive as any right held by foreign states.

absence of an actual conflict with some coastal state use. Under the proposed 1982 United Nations Convention, however, and then only when foreign state military use involves some portion of the first 200-nautical miles of another state's continental shelf, international law expressly dictates the application of a balancing test. In all other instances its application must be inferred. Fourth, in some situations the coastal state is within its rights under current law to take unilateral efforts to remove foreign state military objects emplaced on its continental shelf in violation of international law. Under the dispute settlement provisions of the 1982 United Nations Convention, however, the lawfulness of such unilateral efforts appears justified in only the most extreme cases.

The concluding section of this Article attempts to assess the strategic military consequences and impact on world order of adopting either a regime which permits or one which prohibits foreign state emplacement of military objects on another state's continental shelf. This assessment seems imperative given the inextricable relationship between law and political-military reality in the international realm of arms control. In the final analysis, the concluding section argues that the components of the current superpower military equation commend a proscriptive legal regime. A regime of this character minimizes the likelihood of confrontation, thus ensuring a modicum of international stability.

II. Detection Devices and Naval Ordnance

The modern Navy has four basic missions: sea control, projection of power ashore, presence, and strategic deterrence.[22] The essence of sea control is the ability both to assure one's forces effective and unimpeded use of a specific portion of the oceans and to deny such use to the forces of an adversary.[23] Projection of power ashore does not involve the capability of naval forces to exercise hegemony on the seas but rather the capability to use the seas for mounting a strike against coastal or land-locked states.[24] Unlike sea control and projection of power ashore, naval presence is the mission perhaps most directly related to everyday foreign policy. It involves the orchestrated, noncombat positioning of naval forces to

22. Turner, *The Naval Balance: Not Just a Numbers Game*, 55 Foreign Aff. 339, 343 (1977); Turner, *Missions of the U.S. Navy*, 26 Naval War C. Rev. 2 (1974). *See generally* Komer, *Maritime Strategy vs. Coalition Defense*, 60 Foreign Aff. 1124 (1982); Turner & Thibault, *Preparing for the Unexpected: The Need for a New Military Strategy*, 61 Foreign Aff. 122 (1982).

23. Turner, *The Naval Balance: Not Just a Numbers Game*, 55 Foreign Aff. 339, at 345 (1977).

24. Turner, *Missions of the U.S. Navy*, 26 Naval War C. Rev. at 5, 8 (1974).

influence the resolution of particular political events occurring on shore.[25] Arguably, the most important of the four missions is that of strategic deterrence. This involves the employment of a Navy's nuclear war-making capability to deter adversaries contemplating either limited or all-out nuclear or conventional attack by threatening the kind of retaliation that would be viewed as unacceptably devastating.[26]

Though the SSBN can, to some small extent, operate to support efforts at sea control, it is principally designed to satisfy the mission of strategic deterrence. This mission is effected through its ability to deliver SLBMs against enemy targets. Theoretically speaking, however, an adversary could completely frustrate or at least partially hamper the accomplishment of strategic deterrence or sea control by initiating a surprise or short-warning attack against ports where SSBNs are stationed.[27] This could also be accomplished by deploying an ASW system capable of detecting, identifying, locating, and destroying an opponent's SSBNs as they move from home port to various target acquisition destinations. The latter undertaking — involving the deployment of an ASW system — is of immediate concern to us here[28] and can be divided into operational and system dimensions.

From an operational standpoint, ASW strategy is designed to provide area and/or point defense. In short, area defense seeks to secure vast expanses of ocean-space through the establishment of barriers to an adversary's penetration into larger operational theatres.[29] Generally, these barriers are set up at straits or other natural geological ocean passage zones. Point defense, on the other hand, picks up where area defense leaves off. Specifically, it seeks to assure that the amount and magnitude of attacks launched from SSBNs and other submarines which have eluded

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25. *See generally* E. LUTTWAK, THE POLITICAL USES OF SEA POWER 1-38 (1974). Luttwak labels naval presence "suasion." *Id.* at 3.

26. *See* M. JANIS, *supra* note 17, at 1.

27. *See* HOUSE COMM. ON INT'L RELATIONS, 95TH CONG., 2D SESS., EVALUATION OF FISCAL YEAR 1979 ARMS CONTROL IMPACT STATEMENTS: TOWARD MORE INFORMED CONGRESSIONAL PARTICIPATION IN NATIONAL SECURITY POLICYMAKING 103 (Comm. Print 1979) [hereinafter cited as 1979 ACIS].

28. This is primarily because the Geneva Conventions and the 1982 U.N. Convention apply to law of the sea matters arising during peacetime. *See* C. COLOMBOS, INTERNATIONAL LAW OF THE SEA (5th rev. ed. 1962) (The 1958 Geneva Conventions are discussed under the heading of "The International Law of the Sea in Time of Peace.") and Report of the International Law Commission to the General Assembly, 11 U.N. GAOR Supp. (No. 9) at 3-4, U.N. Doc. A/3159 (1956) *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 256, U.N. Doc. A/CN.4/SER.A/1956/Add. 1 (1957) (1956 draft regulated law of sea "in time of peace only"). A surprise or short-warning attack would involve matters governed by the U.N. Charter.

29. *See* S. HIRDMAN, PROSPECTS FOR ARMS CONTROL IN THE OCEAN 11 (1972).

the barrier control network will be kept to a minimum.[30]

The systems used to staff the ASW networks providing area and point defense fall into the category of detection devices or naval ordnance. Technological advancements have led to the development of detection devices which rely on a staggering variety of methods to detect, identify, and locate enemy submarines. The most important methods include low-light-level television, infra-red line scan, radar sensor, magnetic anomaly detection, active and passive sonobuoy, dipping sonar, and acoustic detection arrays.[31] Some of these methods share certain general features. Specifically, low-light-level television and radar sensor depend on visual apprehension for detection purposes. Infra-red line scan and magnetic anomaly detection rely on inaudible emissions from submarines or the earth itself. Sonobuoys, sonar, and detection arrays, on the other hand,

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30. Once an enemy submarine has escaped allied barrier-control systems, or managed to transit to the deep ocean before the commencement of hostilities, ASW switches to "point defense." Here allied ASW forces, exercising ASW sea assertion capabilities, attempt to frustrate enemy sea denial forces by creating a *cordon sanitaire* around transiting allied vessels.

31. *See* 1979 ACIS, *supra* note 27, at 106, 108; *Antisubmarine Warfare*, in [1974] WORLD ARMAMENTS AND DISARMAMENT 303, 308-13 (Stockholm Int'l Peace Research Institute) (on low light level television, infra-red line scan, radar sensor, magnetic anomoly detection, and sonobuoys) [hereinafter cited as Y.B. WORLD ARMAMENTS: 1974]; K. TSIPIS, TACTICAL AND STRATEGIC ANTISUBMARINE WARFARE 24-25 & app. 1, table 1, A(3) (1974) (on dipping sonar) [hereinafter cited as ANTISUBMARINE WARFARE]. The principal acoustic detection arrays presently employed are the Sonar Surveillance System (SOSUS), *see generally Hearings on Military Posture and H.R. 5068 Before the Comm. on Armed Services*, 95th Cong., 1st Sess. 374-75 (1977); ANTISUBMARINE WARFARE, *supra*, at 29-30; the Azores Fixed Acoustic Range (AFAR), *see* ANTISUBMARINE WARFARE, *supra* at 30 and app. 1, table 1, A(5), and Sea Spider, *see* ANTISUBMARINE WARFARE, *supra* at app. 1, table 1, A(5).

The entire SOSUS system consists of several individual systems, each designed to monitor specific areas of ocean space. "Caesar," the original component of SOSUS, is emplaced on the continental shelf along the eastern seaboard. *See* ANTISUBMARINE WARFARE, *supra* at app. 1, table 1, A(5). A more advanced and refined version, "Colossus," is located on the Pacific shelf off the west coast. *See* Y.B. WORLD ARMAMENTS: 1974, *supra* at 317. "Barrier" and "Bronco," systems similar to those scanning the two seaboards, are believed to be deployed beyond the coasts of the United States allies. *See* ANTISUBMARINE WARFARE, *supra*, at app. 1, table 1, A(5).

AFAR consists of several sonars mounted on top of three or more 130-meter towers, each spaced thirty-five kilometers apart and submerged off the southern-most islands of the Azores group in water 300 to 600 meters in depth. Its principal task is to keep a check on submarines entering and leaving the Mediterranean. Sea Spider is a much more ambitious system. Basically, it is a passive acoustic submarine detection unit composed of a single hydrophonic listening device three meters in diameter and anchored by three cables at a depth of approximately 5,000 meters. The entire unit is reported to be powered by a nuclear battery and stationed a few hundred miles north of Hawaii. In 1969 the Navy attempted unsuccessfully to install such a system. Reports that it later succeeded have not been confirmed.

function on the basis of detectable sound emitted or reflected by submarines.

Detection methods depending upon audible emissions, however, cannot be distinguished among themselves on the basis of differing functional characteristics. Nevertheless, these methods can be categorized as either having passive or active capabilities.[32] If passive, they simply listen for sound emitted as a result of the turbulence of a submarine's motion while proceeding through the ocean.[33] If active, they utilize electromechanical generators, known as transducers, to propagate sound waves and hydrophones to detect reflection of those waves.[34] Whether a sonobuoy, sonar, or a detection array, a passive acoustic detection device has greater operational range than an active system.[35] Active systems, however, are capable of computing target location[36] — a truly invaluable attribute.

One or more of the devices using these detection methods may be carried by satellite, land or aircraft carrier-based fixed wing airplane,

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32. All submarines have two characteristics that make them detectable. First, they generate and diffuse a spectrum of acoustic energy as a result of the cavitation and turbulence of their movement through ocean space. Second, sound-wave emissions that strike the interface of a submarine reflect and become susceptible to detection and analysis. Acoustic energy emission and acoustic energy reflection provide operational foundations for the two generic types of underwater acoustic submarine detection devices, the passive device and the active device.

It should be noted that the nature of the ocean limits the selection of effective devices for submarine detection. For instance, electromagnetic radiation cannot be used because it is too readily attenuated by sea water. As a result, devices utilizing acoustic energy have been employed almost exclusively. Nevertheless, the character of ocean space limits the effectiveness of even these devices. Specifically, the velocity of acoustic sound waves is directly related to ocean temperature, ocean salinity, water pressure (which is a function of depth), and water turbulence. These factors necessarily mean that there are variations in both sound wave velocity and consequential acoustic energy reflection from one ocean to another, or even from one spot to another within the same ocean.

33. The passive device consists of hyper-sensitive hydrophones or listening instruments that detect sound emissions generated by transiting vessels. These devices then relay the detected emissions to an awaiting computer analysis unit, which processes out the ambient ocean noise and attempts to identify the nature of the transiting object.

34. The transducers used by the active system are designed to convert electrical energy into acoustic energy and to propagate the resulting sound waves through ocean space. The hydrophones then listen to detect any reflection of the sound waves, processing all information in a manner similar to that used by the passive system.

35. Passive devices can pick up sound generated as far as 100 miles away. *See* Brown, *Military Uses of the Ocean Floor*, in PACEM IN MARIBUS 285, 288 (E. Borgesse ed. 1972). Some authorities, however, set the range at 100 kilometers. *See* Y.B. WORLD ARMAMENTS: 1974, *supra* note 31, at 307. Active systems, on the other hand, are said to have a range of about 50 miles. *See* Brown, *supra* at 287.

36. Processing units accomplish this by triangulation and measuring the time it takes for sound pulses to return to the hydrophones.

helicopter, surface ship, antisubmarine submarine, or may be deployed in the waters of the oceans or fixed on the ocean's floor.[37] Generally, basing platforms using airspace or outer space will carry detection devices relying on low-light-level television, infra-red line scan, radar sensors, or magnetic

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37. Y.B. WORLD ARMAMENTS: 1974, *supra* note 31, at 298 (on satellite based devices). The Orion P-3C is the principal land-based aircraft used in ASW. It has a patrol speed of approximately 200 knots and is capable of deploying eighty-seven active and passive sonobuoys. *Id.* at 310. *See also* ANTISUBMARINE WARFARE, *supra* note 31, at 22. The active sonobuoys are said to have an effective detection range of about three kilometers; the passive devices have a reported range of approximately ten kilometers. *See* Y.B. WORLD ARMAMENTS: 1974, *supra* note 31, at 310. The principle carrier-based aircraft used in ASW is the Viking S-3A. The Viking is a twin-engine jet with a sea-level loiter speed of 160 knots and a maximum patrol range of 2,000 to 3,000 nautical miles.

In recent years the helicopter has proven an effective ASW platform. The operational union of helicopters and long-range, fixed-wing aircraft has permitted large-area "sanitization," compelled by the advent of submarine-based surface-to-surface cruise missiles with effective ranges of from 20 to 400 kilometers. In an effort to detect transiting submarines, the United States Navy has stationed both dipping sonar and sonobuoys aboard land- and carrier-based helicopters. The best known anti-submarine helicopter employing both dipping sonar and sonobuoys is the Sea King SH-3 series. *See* ANTISUBMARINE WARFARE, *supra* note 31, at 24 and app. 1, table 1, A(3). The Sea King is a land- or carrier-based helicopter piloted by a four-man crew. It carries active acoustic dipping sonar with a range of a few kilometers, as well as various active and passive sonobuoys. These include the AN/SSQ-53 D.I.F.A.R. (passive sonobuoy), AN/SSQ-47/47B (active miniature sonobuoy used for localization, code-named "Julie"), AN/SSQ-50 (a self-powered active localization unit), and "Cass" (command-activated sonobuoy system). *See id.* at app. 1, table 1, A(4). The sonobuoys are dropped on the surface, like those used by the Orion P-3C and the Viking S-3A. They scan the area for audible sound emissions and transmit information to the hovering helicopter, where it is processed and analyzed. Employing both sonobuoys and dipping sonar, the Sea King can effectively "sanitize" a large expanse of ocean space in a relatively short period of time.

The Surveillance Towed Array Sensor System (SURTASS) is a surface-ship based, mobile, long-range, passive surveillance system designed to supplement the SOSUS network. It consists of an acoustic hydrophone array towed astern civilian-manned small vessels. *See* SENATE COMM. ON FOREIGN RELATIONS AND HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 1ST SESS., FISCAL YEAR 1982 ARMS CONTROL IMPACT STATEMENTS 355, 357 (Joint Comm. Print 1982).

On detection devices carried aboard United States SSBNs, see 1979 ACIS, *supra* note 27, at 109-10.

Having characteristics of both the free-floating sonobuoy and the fixed acoustic detection array are the Moored Surveillance System (MSS) and its follow-on, the Rapidly Deployable Surveillance System (RDSS). MSS consists of command-activated, long-life sonobuoys which are dropped from the air and which automatically moor themselves to the ocean floor to prevent displacement. Each sonobuoy is equipped with an elaborate communication and detection system having a useful life of about ninety days. The deployment scenario calls for each sonobuoy to be placed in a position that facilitates submarine localization through triangulation techniques. The fact that the sonobuoys can be moored in up to 3,000 fathoms of water creates the likelihood of a deep-ocean detection capability. *See* ANTISUBMARINE WARFARE, *supra* note 31, at 30 and app. 1, table 1, A(5). *See also* Y.B. WORLD ARMAMENTS: 1974, *supra* note 31, at 317-18. RDSS is quite similar. *See* 1980 ACIS, *supra* note 9, at 107.

anomaly detection. Those basing platforms using the waters or bed of the oceans will carry active or passive sonobuoy, dipping sonar, or other acoustic detection systems.

Complementing the various detection systems are four types of weapons, each capable of disposing of enemy submarines. These weapons include depth charges, antisubmarine rockets, antisubmarine torpedos, and submersible antisubmarine mines. While the exact capabilities of these weapons remain classified, reports suggest they may be awesome. Many of the depth charges, rockets, and torpedos are, or can be, armed with nuclear explosive devices.[38] Some have target acquisition ranges of about 50,000 meters with diving abilities of up to 1,000 meters.[39] Less astounding capabilities are possessed by the depression and magnetic-acoustic submersible mines[40] which have become widely used in recent years. While they incorporate the latest technological innovations, they have a basic range limitation of about 30 fathoms.

Two developments have occurred during the last fifteen years which seem indicative of technology's impact on modern antisubmarine warfare. As reported in the Stockholm International Peace Research Institute's annual publication, *World Armaments and Disarmament*,[41] military technologists can now deploy huge fixed acoustic detection devices capable of insonifying all ocean space. The detection devices would consist of a massive tower resting on the ocean floor at a depth of 5,000 meters with each leg of the tower's tripod 10 kilometers apart. On top of this structure would sit an acoustic detection array consisting of electromechanical transducers and hydrophonic receivers.[42] It has been suggested that only one such device need be stationed in each of the world's oceans in order to permit continual surveillance of all conventional and nuclear powered submarines.

The second technological development involves a new, moored, submersible, magnetic/acoustic mine.[43] This new mine has integrated

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38. *See Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S.2294 Before the Subcomm. on Research and Development of the Senate Armed Services Comm.*, 96th Cong., 2d Sess. 3102-06 (1980) (discussing the SUBROC nuclear depth bomb and various torpedoes) [hereinafter cited as *Department of Defense Authorization*].

39. *Id.*

40. Depression mines rest on or are secured to the sea floor. Unlike physical-contact mines, which explode on impact, depression mines depend on fluctuations in the hydrostatic pressure. Magnetic acoustic mines also rest on or are secured to the sea floor. They are activated by changes in the surrounding magnetic or acoustic energy levels.

41. *See* Y.B. WORLD ARMAMENTS: 1974, *supra* note 31.

42. Y.B. WORLD ARMAMENTS: 1974, *supra* note 31, at 317.

43. This is the Captor, or Encapsulated Torpedo, mine. *See* 1979 ACIS, *supra* note

various technological innovations which give it the ability to detect an enemy submarine, release itself from its mooring device, and then propel itself to its targeted destination. Indications are that this moored torpedo may be deployed by airplane, surface ship, or submarine,[44] and that it has a sensor acquisition radius of about one kilometer.[45]

Even though these two new developments will not change the basic nature of antisubmarine warfare, they show continuous and rapid progress in that field. At some point, inevitably the pace of such progress will place all SSBNs in jeopardy. In light of these developments, claims by foreign states to use another state's continental shelf for military purposes take on added significance.

Information presently available to the general public suggests that while the United States currently possesses the capability to employ each of the detection methods and weapons systems discussed above,[46] the Soviets apparently have yet to reach a comparable level of sophistication.[47] Nevertheless, given the increasing level of Soviet military technology,[48] it seems that the Soviets could acquire a matching ability after a reasonable period of intense research and development.[49] Indeed, if one accepts the view that recent Soviet strategic military efforts reveal an intent to acquire a war-winning capability, there would be every reason to suspect that in the near future the Soviets might feel compelled to concentrate greater attention on antisubmarine warfare.[50]

27, at 108.

44. *See Department of Defense Authorization, supra* note 38, at 3111.

45. *See* ANTISUBMARINE WARFARE, *supra* note 31, at 33.

46. *See supra* notes 31-45 (United States possesses capabilities in all areas discussed).

47. *See* ANTISUBMARINE WARFARE, *supra* note 31, at 66-68 and accompanying tables of reference cited therein.

48. On Soviet efforts in the field of anti-satellite (ASAT) weapons, see Robinson, *Soviets Push for Beam Weapon*, 106 AVIATION WEEK & SPACE TECH. 11 (1977); Thompson, *"Directed Energy" Weapons and the Strategic Balance*, 23 ORBIS 697 (1979). For commentary on the legal aspects of ASAT weapons, see Zedalis & Wade, *Anti-Satellite Weapons and the Outer Space Treaty of 1967*, 8 CALIF. W. INT'L L.J. 454 (1978). On Soviet ability to MIRV (to place multiple warheads on its ICBMs) as early as 1974, see 1979 ACIS, *supra* note 27, at 55. On Soviet efforts to improve the accuracy of its ICBMs, see *id.* at 56.

49. The Soviets apparently seek major breakthroughs, rather than incremental advances, in almost every area of military technology. For apprehensions thus generated in the field of anti-submarine warfare, see 1979 ACIS, *supra* note 27, at 106.

50. This is a logical expectation since it would result in adding the United States' SLBMs to its already jeopardized land-based ICBM force, leaving the Soviets with more attention to concentrate on intercepting long-range bombers. For an analysis of Soviet air defense against an attack by the United States' bomberforce, see Rummel, *Will the Soviet Union Soon Have a First-Strike Capability?*, 20 ORBIS 579, 584-86 (1976).

III. INTERNATIONAL LEGAL PRINCIPLES

As in many other areas of international law, the codified juridical norms governing military uses of the oceans during peacetime are derived either from conventions directed at specific activities or from conventions containing general provisions designed to deal with the entire range of conceivable activities. Those directed at the restriction of some specific military use of the oceans include the Limited Test Ban Treaty of 1963 (LTB),[51] Seabed Arms Control Treaty of 1971 (SACT),[52] and the Anti-Ballistic Missile Treaty of 1972 (ABM Treaty).[53] Each of these treaties contains provisions proscribing particular military uses of the oceans. These proscribed uses range from nuclear weapons testing to the development, testing, or deployment of sea-based ballistic missile defense systems.[54] In situations where one state's military use of another state's continental shelf is not covered by treaties directed at specific activities, the relevant international legal principles are those contained in the more general provisions of the 1958 Geneva Conventions on the Continental Shelf[55] and the High Seas[56] and the proposed 1982 United Nations Convention on the Law of the Sea.[57]

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51. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *done* Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 [hereinafter cited as LTB]. *See generally* X, *Nuclear Test Ban Treaty of 1963*, 39 BRIT. Y.B. INT'L L. 449 (1963); Schwelb, *The Nuclear Test Ban Treaty and International Law*, 58 AM. J. INT'L L. 642 (1964).

52. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, *done* Feb. 11, 1971 23 U.S.T. 701, T.I.A.S. No. 7337 [hereinafter cited as SACT]. *See generally* Krieger, *The United Nations Treaty Banning Nuclear Weapons and Other Weapons of Mass Destruction on the Ocean Floor*, 3 J. MAR. L. & COMM. 107 (1971); Rao, *The Seabed Arms Control Treaty: A Study in the Contemporary Law of the Military Uses of the Seas*, 4 J. MAR. L. & COMM. 67 (1972).

53. Limitations on Anti-Ballistic Missile Systems, *done* May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503 [hereinafter cited as ABM].

54. The LTB prohibits nuclear test explosions in territorial waters or in the high seas. LTB, *supra* note 51, at art. 1, 14 U.S.T. at 1316, 480 U.N.T.S. at 45. The SACT prohibits the installation of nuclear weapons or weapons of mass destruction on the sea floor at any point beyond twelve miles from the coastline of any state. SACT, *supra* note 52, at art. 1, 23 U.S.T. at 704. The ABM Treaty prohibits the development, testing, or deployment of any sea-based BMD system. ABM, *supra* note 53, at art. 5, 23 U.S.T. at 3441.

55. *See supra* note 14.

56. *Id.*

57. *See* 1982 Convention on Law of Sea, *supra* note 15.

A. *The Continental Shelf and Freedom of the Seas*

Prior to the Gulf of Paria Treaty of 1942[58] and the Truman Proclamation of 1945,[59] the concept of the continental shelf as a legal regime was not widely accepted. In the view of most commentators, the national jurisdiction of a coastal state extended to the waters of its territorial sea and the bed subjacent thereto. The waters beyond that marginal belt of coastal state jurisdiction were held to be the high seas, and the entire bed beneath those waters was said to be the bed of the high seas.[60]

Most of the discussion in the years intervening between the Truman Proclamation of 1945 and the final adoption of the Continental Shelf Convention of 1958 focused on the legal status of that portion of the bed of the high seas which was ultimately encompassed by the developing shelf concept. The principle positions articulated were that the area was *res nullius* (owned by no one), and therefore subject to appropriation by anyone, or *res communis* (common property), and therefore subject to appropriation by no one.[61] Nonetheless, since proponents on both sides of the debate viewed the area, which later became the continental shelf, as a portion of the bed of the high seas,[62] the area was seen as subject to the

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58. Treaty of 1942 relating to Submarine Areas of the Gulf of Paria, Feb. 26, 1942, Great Britain-Northern Ireland-Venezuela, 205 L.N.T.S. 121.

59. Proclamation No. 2667, 3 C.F.R. 67 (1943-1948 Comp.).

60. *See* 4 First United Nations Conference on the Law of the Sea, Official Records 42, para. 29 [hereinafter cited as UNCLOS I, Off. Rec.], U.N. Doc. A/Conf.13/40/SR.17 (1958) (comment of Mr. Pedreira of Brazil indicating distinction between territorial sea waters and high sea waters). *See* Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 377 (1950) (noting that some writers viewed seabed outside territorial waters as open to use by all, and others viewed it as open to appropriation by individual state; all writers viewed it as "seabed under the high seas").

61. For a discussion of the various views, see C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 81 (6th rev. ed. 1967); 1 P. FAUCHELLE, TRAITE DE DROIT INTERNATIONAL PUBLIC pt. II, 17-19 (1925); 1 G. GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER 498-501 (1932); E. VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (1758); 1 J. WESTLAKE, INTERNATIONAL LAW 186-88 (1904); Hurst, *Whose is the Bed of the Sea?*, 4 BRIT. Y.B. INT'L L. 33 (1923-1924); Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376 (1950); Waldock, *The Legal Basis of Claims to the Continental Shelf*, 36 TRANS. OF THE GROTIUS SOC'Y 115, 116-48 (1951).

62. *See* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FORTY-FOURTH CONFERENCE (Aug. 27-Sept. 2, 1950) at 131. With regard to the sea now considered to be the continental shelf, the Conference reported that:

> [t]he doctrine that the seabed (as distinguished from its subsoil) outside territorial waters is to be regarded as *res communis*, i.e., incapable of acquisition by any state, does not differentiate between the status of that seabed and the status of the waters above. It indicates no lawful basis for the exploitation of the resources of the continental shelf in those cases in which it is technically necessary to pierce the *bed of the high seas* and to erect installations thereon.
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> This doctrine has been attacked by those who hold — mostly for practical

fundamental doctrine of freedom of the seas.[63] And since freedom of the seas included the freedom of military use,[64] it would appear that the portion of the bed which eventually became the continental shelf of an adjoining coastal state was, in principle, subject to military use by all states.[65]

The doctrine of freedom of the seas was eventually codified with the adoption of the High Seas Convention[66] at the conclusion of the First United Nations Conference on the Law of the Sea (UNCLOS I) in Geneva, Switzerland in 1958. Article 2 of the High Seas Convention states that the freedom comprises, "*inter alia*," navigation, fishing, overflight, and the laying of submarine cables or pipelines.[67] The area to which the freedom applies is the high seas, defined by Article 1 as "all parts of the sea" beyond territorial seas of other states.[68] No mention is made of a freedom to undertake military uses not within one of the enumerated freedoms; nor of the freedoms, whatever they include, being applicable to the bed as well as the waters beyond the bed and waters of the territorial seas of other states.

With respect to there being a freedom to engage in military uses not

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reasons — that the *bed of the high seas*, like its subsoil and unlike its waters above, is *res nullius*, over which control and jurisdiction may be acquired, as over "no man's land", *i.e.*, by effective occupation, provided adequate measures are taken to safeguard the right of all nations with regard to freedom of navigation and fishing.

Id. at 125 (emphasis added).

63. *See* Summary Records of the 293d Meeting, [1955] 1 Y.B. INT'L L. COMM'N 54, 58, U.N. Doc. A/CN.4/SER.A/1955 (1960). Mr. Scelle stated at the seventh session of the International Law Commission that he was opposed to accepting a proposal on the high seas advanced by Mr. Zourek "since it was incomplete and open to misinterpretation in that it failed to stipulate that the *seabed* and superjacent air were subject to the same regime as the high seas." *Id.* (emphasis added). Scelle observed, at the 320th meeting, that, in addition to navigation, fishing, overflight, and the laying of cables and pipelines, "there were other freedoms covered by [freedom of the seas] such as the right to scientific research, and to the exploitation of the resources of the *seabed*." *See also id.* at 222 (emphasis added).

64. For support for the notion that freedom of the sea includes military use, see McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 678 (1955). *See also* U.S. Delegation Paper, *Legality of Using the High Seas in Connection with Nuclear Weapons Tests in the Pacific Ocean*, U.N. Conference on the Law of the Sea, 1958, US/CLS/POS/48(2)-(3), Annex II, Feb. 20, 1958, *reprinted in* 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 546, 548 (1965); L. HENKIN, CHANGING LAW FOR THE CHANGING SEAS 84-86 (1968). *See also* Washburn, *The Legality of Pacific Blockade* (pts. 1-3), 21 COLUM. L. REV. 55, 227, 442 (1921).

65. It should be noted that, even then, Article 2(4) of the United Nations Charter prohibited military uses involving force against the shelf state.

66. *See* 1958 High Seas Convention, *supra* note 14, at art. 2, 13 U.S.T. at 2314, 450 U.N.T.S. at 82-83.

67. *Id.*, 13 U.S.T. at 2314, 450 U.N.T.S. at 82.

68. *Id.*, 13 U.S.T. at 2314, 450 U.N.T.S. at 82-83.

covered by navigation, overflight, and the laying of cables or pipelines, attention need only be drawn to the reference to "*inter alia.*"[69] From all indications, this open-ended reference was deliberately included to signify that the enumeration of freedoms was not exhaustive.[70] Most significant, however, is that the Second Committee at UNCLOS I refused to endorse two separate proposals prohibiting military uses not within any of the enumerated freedoms.[71] The Three Power proposal[72] would have prohibited military maneuvers and weapons practice on the high seas near foreign coasts, and the Four Power proposal[73] would have prohibited nuclear weapons tests anywhere on the high seas.The rejection of these proposals intimates that the term "*inter alia*" encompasses a wide range of military undertakings.

With respect to the freedoms of the seas — including the freedom of military use — applying to the seabed as well as to the waters beyond the territorial seas of other states, several pieces of evidence come readily to mind. First, the very definition of the term "high seas" is declared by Article 1 of the High Seas Convention to include "all parts of the sea" not

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69. *See supra* note 66.

70. *See* Summary Records of the 320th Meeting, [1955] 1 Y.B. INT'L COMM'N 220, 222, U.N. Doc. A/CN.4/SER.A/1955 (1960). *See also* Report of the International Law Commission to the General Assembly, 10 U.N. GAOR, Supp. (No. 9) at 3, art. 2, U.N. Doc. A/2934 (1955), *reprinted in* [1955] 2 Y.B. INT'L L. COMM'N 19, 21-22, U.N. Doc. A/CN.4/SER.A/1955/Add.1 (1960); Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) at 24, U.N. Doc. A/3159/(1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 278, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957).

71. *See* 4 UNCLOS I, Off. Rec., *supra* note 60, at 54; U.N. Doc. A/Conf.13/40/SR.21 (1958) (rejecting the Three Power proposal 43 to 13, with 9 abstentions). The second, or Four Power proposal, was countered with a United Kingdom proposal, U.N. Doc. A/Conf.13/C.2/L.64, *reprinted in* 4 UNCLOS I, Off. Rec., *supra* note 60, Annex 132, U.N. Doc. A/Conf.13/40 (1958), later withdrawn, 4 UNCLOS I Off. Rec., *supra* note 60, at 47, U.N. Doc. A/Conf.13/40/SR.18 (1958). An Indian compromise, U.N. Doc. A/Conf.13/C.2/L.71/Rev. 1, *reprinted in* 4 UNCLOS I Off. Rec., *supra* note 60, Annex 134, U.N. Doc. A/Conf.13/40 (1958), which prevented the Four Power proposal from being rejected and resulted in the matter being referred to the United Nations General Assembly. The specific proposals involved were the Three Power Proposal which prohibited military maneuvers and weapons practice on the high seas near the coasts of foreign states, U.N. Doc. A/Conf.13/C.2/L.32, *reprinted in* 4 UNCLOS I, Off. Rec., *supra* note 60, Annex 124, U.N. Doc. A/Conf.13/40 (1958), and the Four Power Proposal which prohibits nuclear weapons tests on the high seas, U.N. Doc. A/Conf.13/C.2/L.30, *reprinted in* 4 UNCLOS I, Off. Rec., *supra* note 60, Annex 124 (1958).

72. U.N. Doc. No. A/Conf.13/C.2/L.32, *reprinted in* 4 UNCLOS I, Off. Rec., *supra* note 60, Annex 124, U.N. Doc. No. A/Conf.13/40 (1958).

73. U.N. Doc. No. A/Conf.13/C.2/L.30, *reprinted in* 4 UNCLOS I, Off. Rec., *supra* note 60, Annex 124, U.N. Doc. A/Conf.13/40 (1958).

within the territorial sea of other states.[74] That this broad reference includes more than just the water surface and navigable water column, is supported by the fact that one of the three freedoms mentioned in Article 2 is that of overflight.[75] Second, Article 26(1) of the Convention expressly applies one of the freedoms, that of laying cables and pipelines, to the bed of the sea.[76] Third, commentaries of 1955 and 1956 by the International Law Commission (ILC) on earlier drafts of Article 2 of the High Seas Convention expressly note that one of the unenumerated freedoms within the reference "*inter alia*" is exploration and exploitation of the "subsoil."[77] Finally, the Second Committee at UNCLOS I specifically rejected, by a vote of 27 to 2, with 25 abstentions, a Brazilian proposal which would have applied the freedoms to the waters alone.[78]

B. Convention on the Continental Shelf: The Current Law

Apart from the High Seas Convention, UNCLOS I also produced a Continental Shelf Convention reflecting the international community's acceptance of a special relationship between a coastal state and the seabed extending off its coast to the point where the water depth is 200 meters or,

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74. 1958 High Seas Convention, *supra* note 14, at art. 1, 13 U.S.T. at 2314, 450 U.N.T.S. at 82.

75. *See* 1958 High Seas Convention, *supra* note 14, at art. 2, 13 U.S.T. at 2314, 450 U.N.T.S. at 82-83.

76. 1958 High Seas Convention, *supra* note 14, at art. 26, para. 1, 13 U.S.T. at 2319, 450 U.N.T.S. at 96 ("All States shall be entitled to lay submarine cables and pipelines on the bed of the high seas.").

77. *See* Report of the International Law Commission to the General Assembly, 10 U.N. GAOR, Supp. (No. 9) at 3-4, U.N. Doc. A/2934 (1955), *reprinted in* [1955] 2 Y.B. INT'L L. COMM'N 19, 21-22, U.N. Doc. A/CN.4/SER.A/1955/Add.1 (1960) (stating that "[the Commission] is aware that there are other freedoms, such as freedom to explore or exploit the subsoil of the high seas and freedom to engage in scientific research therein.") *See also id.*, 11 U.N. GAOR, Supp. (No. 9) at 26, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 278, U.N. Doc. A/CN.4/SER.A/Add.1 (1957).

78. Mr. Pedreira, the delegate from Brazil, desired to have the term "high seas" changed to read "*waters* of the high seas." He then proposed to define "waters of the high seas" to mean "those waters lying between the outer limits of the territorial sea," referring to the territorial seas of all states. U.N. Doc. A/Conf.13/C.2/L.66 and L.67, *reprinted in* 4 UNCLOS I, Off. Rec., *supra* note 60, Annex 133, U.N. Doc. A/Conf.13/40 (1958) (emphasis added). Mr. Pedreira had been particularly interested in delimiting not only the horizontal zones of ocean space but also the *vertical zones*. He felt that his proposal would accomplish this delimitation and would confine the applicability of the principles to the *water surface and column only*, leaving the seabed unaffected. *See* 4 UNCLOS I, Off. Rec., *supra* note 60, at 42, U.N. Doc. A/Conf.13/40/SR.10 (1958) (remarks of Mr. Pedreira). Committee II rejected the proposal designed to emphasize the distinction, *id.* at 52, 53, forcing Pedreira to withdraw the other. *See id.* at 54, U.N. Doc. A/Conf.13/40/SR.22 (1958). The rejection of the one proposal and the withdrawal of the other may well indicate that what appears to be expansive language in Articles 1 and 2 should be so construed.

even beyond that, to where the water admits of exploitation.[79] The Shelf Convention changed the characterization of that specific portion of the seabed from what had previously been viewed as the bed of the high seas to the legal continental shelf of the coastal state. The precise language of Article 2(1) of the Shelf Convention which produced the change states: "[t]he coastal State exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources."[80] Two questions quite naturally arise. First, did the right of foreign state military use survive the Shelf Convention? Second, if it did, what happens when the exercise of that right conflicts with activities of the coastal state?

1. The Right of Foreign State Military Use

(a) Reaffirmation: 1953-1958

1953: Evidence drawn from the *travaux preparatoires* (preparatory documents) suggests that the right of foreign state military use survived the Shelf Convention. The earliest indications from the ILC that it apparently did not view the recognition of coastal state "sovereign rights" in the continental shelf as destroying the traditional right of foreign state military use are found in the records of its fifth session in 1953.[81] The language of Article 2 of the Shelf Convention considered at that session was from the ILC's 1951 draft, which provided the coastal state with "control and jurisdiction" to explore the shelf and exploit its natural resources.[82] Ultimately, that specific language was rephrased in 1953

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79. *See* 1958 Continental Shelf Convention, *supra* note 14, at art. 1, 15 U.S.T. at 473, 499 U.N.T.S. at 312.

80. *Id.*

81. *See* Summary Records, [1953] 1 Y.B. INT'L COMM'N 83-102, U.N. Doc. A/CN.4/SER.A/1953 (1959); Report of the International Law Commission to the General Assembly, 8 U.N. GAOR, Supp. (No. 9) at 12-19, U.N. Doc. A/2456 (1953), *reprinted in* [1953] 2 Y.B. INT'L COMM'N 212-20, U.N. Doc. A/CN.4/SER.A/Add.1 (1959).

82. *See* Report of the International Law Commission to the General Assembly, 6 U.N. GAOR Supp. (No. 9) at 17, 18, U.N. Doc. A/1858 (1951), *reprinted in* [1951] 2 Y.B. INT'L L. COMM'N 123, 141 (1957) ("The continental shelf is subject to the exercise by the coastal State of *control and jurisdiction* for the purpose of exploring it and exploiting its natural resources." (emphasis added)). In comment 7 to article 2, the ILC stated:

> Article 2 avoids any reference to "sovereignty" of the coastal State over the submarine areas of the continental shelf. As control and jurisdiction by the coastal State would be exclusively for exploration and exploitation purposes, they cannot be placed on the same footing as the general powers exercised by a State over its territory and territorial waters.

Id. at 142. This clearly reveals that the ILC's interest was to limit coastal State rights to exploration and exploitation.

following the reconsideration and rejection[83] of an earlier adopted proposal advanced by the British representative, Mr. Lauterpacht, designed to "subject [the continental shelf] to the sovereignty of the coastal state."[84] The final language provided the coastal state with "sovereign rights [over the continental shelf] for the purpose of exploring and exploiting its natural resources." This language is virtually identical to that found in Article 2 of the 1958 Continental Shelf Convention.[85]

Before consideration of the adopted Lauterpacht proposal actually occurred, an interesting and revealing exchange took place between the Chinese representative, Mr. Hsu, and Chairman Amado. The immediate impetus for the exchange was a proposal by the Russian representative, Mr. Kozhevnikov, to add a second sentence to Lauterpacht's language clearly limiting the exercise of sovereignty to exploration and exploitation of the shelf's natural resources.[86] Kozhevnikov's proposal, as well as several similar proposals,[87] reflected a desire to clarify Lauterpacht's language by

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83. *See infra* note 93.

84. *See* Summary Records of the 197th meeting, [1953] 1 Y.B. INT'L L. COMM'N 79, 84, U.N. Doc. A/CN.4/SER.A/1953 (1959). Lauterpacht's proposal was motivated by an interest in assuring coastal state jurisdiction to deal with crimes on or beneath the shelf, and he explained it as being subject to freedom of the seas. Report of the International Law Commission to the General Assembly, 8 U.N. GAOR, Supp. (No. 9) at 69, U.N. Doc. A/2456 (1953), *reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 200, 266, 267, U.N. Doc. A/CN.4/SER.A/1953/Add.1 (1959); Summary Records of the 198th Meeting, [1953] 1 Y.B. INT'L L. COMM'N 85, 86, para. 10, U.N. Doc. A/CN.4/SER.A/1953 (1959).

85. Report of the International Law Commission to the General Assembly, 8 U.N. GAOR, Supp. (No. 9) at 14, U.N. Doc. A/2456 (1953), *reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 200, 212, U.N. Doc. A/CN.4/SER.A/1953/Add.1 (1959).

86. *See* Summary Records of the 200th Meeting, [1953] 1 Y.B. INT'L L. COMM'N 97, U.N. Doc. A/CN.4/SER.A/1953 (1959) ("The sovereign rights over the continental shelf are exercised by the coastal State for the purpose of exploring and exploiting the natural resources of this continental shelf."). Kozhevnikov had submitted a similar proposal shortly after Lauterpacht's had been adopted. *Id.* at 89 (198th mtg.). However, it was defeated at the next meeting. *Id.* at 92 (199th mtg.).

87. Between the time Lauterpacht submitted his proposal and the ILC acted favorably on it, Mr. Francois, the representative of the Netherlands, moved a substantive amendment providing that "[o]n the sea-bed, however, the coastal State has only the rights of control and jurisdiction for the purpose of exploring it and exploiting its natural (or mineral) resources." *Id.* at 85 (198th mtg.). Shortly thereafter Lauterpacht proposed the following limiting language: "On the sea-bed the exclusive rights of the coastal States are limited to the exercise of rights of control and jurisdiction for the purpose of exploring and exploiting the mineral resources of the sea-bed and its subsoil." *Id.* at 89 (198th mtg.). Indeed, even as the ILC began its consideration of the 1951 draft of Article 2, the Indian representative Mr. Pal advanced a proposal to change "control and jurisdiction" to "sovereign rights of control and jurisdiction," but only in the context of a limitation on the purposes for which sovereign rights could be exercised. Pal's proposal read: "The coastal State has the sovereign rights of control and jurisdiction over the continental shelf in respect only of its mineral resources and of the exploration and exploitation of the same." *Id.* at 87.

circumscribing the purposes for which a coastal state could exercise authority over the shelf. Hsu inquired, in recognition of this limiting feature, whether the Kozhevnikov proposal permitted a coastal state to take measures of security, "objecting, for instance, to another state's sending a submarine into [the] area and concealing it there?"[88] The inquiry generated no immediate response.[89] Hsu then suggested that, since the Lauterpacht proposal referred to "sovereignty," it would only be "reasonable to expect claims for security to be made by the coastal state," notwithstanding the existence of additional language attached to the grant with a view to limiting the purposes for which sovereignty could be exercised.[90]

Hsu's characterization of the significance of providing that the coastal state has "sovereignty" over the shelf caught the immediate attention of Chairman Amado. He reacted by rather cryptically reminding Hsu and the other delegates that it had been Great Britain which had proposed "sovereignty" and that doubtless she was one of the premier champions of freedom of the seas.[91] Amado's observation was not objected to by Lauterpacht or any other delegate present.

This exchange obviously captured the essence of what a coastal state could not do under Lauterpacht's language of sovereignty. By virtue of this, it also suggested what a foreign state was entitled to do. Since foreign state military use had traditionally been permissible and the proposal to grant a coastal state "sovereignty" had been advanced by a champion of freedom of the seas in the interest of assuring coastal state criminal jurisdiction, that proposal seemed in no way intended to change the law concerning foreign state military use.[92] The subsequent reconsideration by

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See also the proposal of Mr. Spiropolous, *infra* note 89, made at the 200th meeting.

88. *See* Summary Records of the 200th Meeting, [1953] 1 Y.B. INT'L L. COMM'N 98, U.N. Doc. A/CN.4/SER.A/1953 (1959).

89. It was followed, however, by a proposal of the Spanish representative Mr. Alfaro to further assure the limiting quality of Kozhevnikov's proposal by inserting the word "sole" before the word "purpose." *Id.* The Greek representative Mr. Spiropolous then proposed that Lauterpacht's earlier adopted proposal of "sovereignty" be merged with a limitation so that there would be only one sentence reading: "The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources." *Id.*

90. *Id.* at 99.

91. *Id.*

92. One possible problem with reading the Hsu/Amado exchange as suggesting the continuation of the right of foreign state military use is Hsu's reference to submarines. That submarines navigate in the water above the shelf might lead some to contend that the exchange can only prove helpful in establishing that coastal state rights in the shelf do not affect the status of superjacent waters. This is an accurate statement of an international legal principle, but that this is the proposition for which the Hsu/Amado exchange stands,

the ILC of the Lauterpacht proposal and its ultimate rejection of that proposal in favor of one advanced by the Greek representative, Mr. Spiropolous,[93] containing the very language finally reflected in the 1953 draft of Article 2 in no way weakens this basic conclusion.[94] Indeed, if the

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seems incorrect for one simple reason: It is abundantly clear that the context in which the exchange occurred focused on the shelf and not the waters above it.

93. Spiropolous' language was initially advanced after Hsu's inquiry concerning the Kozhevnikov proposal, and was withdrawn after Amado's reaction. Summary Records of the 200th Meeting, [1953] 1 Y.B. INT'L L. COMM'N 99, U.N. Doc. A/CN.4/SER.A/1953 (1959). At roughly the same time, the Alfaro and the Kozhevnikov proposals were rejected. Summary Records of the 200th Meeting, [1953] 1 Y.B. INT'L L. COMM'N 100, U.N. Doc. A/CN.4/SER.A/1953 (1959). Lauterpacht's and Francois' proposals had been withdrawn before the Hsu/Amado exchange. Summary Records of the 199th Meeting, [1953] 1 Y.B. INT'L L. COMM'N 91, U.N. Doc. A/CN.4/SER.A/1953 (1959). The Pal proposal, however, was still alive. After Spiropolous withdrew his language, Pal's proposal was amended to read: "The exclusive rights of the coastal State are limited to the rights of user, control and jurisdiction for the purposes of exploration and exploitation of the natural (mineral) resources of the sea-bed and its subsoil." Summary Records of the 200th Meeting, [1953] 1 Y.B. INT'L L. COMM'N 101, U.N. Doc. A/CN.4/SER.A/1953 (1959). Subsequently, that language was adopted by a vote of 7 to 5, with 1 abstention, *id.* at 101, and then Article 2 as a whole — containing Lauterpacht's language as its first sentence and Pal's as its second — was adopted 8 to 4, with 1 abstention. *Id.* at 101-02.

At the 210th Meeting, the Swedish representative Mr. Sandstrom moved that Article 2 as adopted at the 200th meeting be reconsidered. *Id.* 169, para. 73. The motion passed, 9 to 4, with 1 abstention. *Id.* Sandstrom then proposed that the first sentence be deleted since he had been absent from the 198th meeting when that sentence, advanced by Lauterpacht, was adopted. *Id.* Actually, though Lauterpacht's language had been adopted 6 to 5, with 1 abstention, *id.* at 88, 7 of the 13 delegates spoke against it. *See id.* at 79 & 85 (197th & 198th mtgs.). Following Sandstrom's proposal to delete the first sentence of Article 2, Spiropolous resubmitted his own earlier withdrawn language. *Id.* at 169 (210th mtg.). At a later meeting, Sandstrom explained that his fear of the language used in the first sentence stemmed from that "sovereignty over a territory was bound to result in sovereignty over what lay above that territory." *See id.* at 199 (215th mtg.). Thus, he proposed that the language, however limited by Lauterpacht, be replaced with "exclusive rights of control and jurisdiction." *Id.* Mr. Alfaro, seeking to assure the delegates that Lauterpacht's proposal, although couched in terms of "sovereignty," was really only designed to guarantee coastal states the right to handle activities related to exploration and exploitation stated, "[i]t was . . . abundantly clear that the Commission was not recognizing the coastal State's sovereignty over the continental shelf, but its exclusive . . . right of control and jurisdiction for the purposes of exploring and exploiting." *Id.* at 201. Many were unsatisfied with the language of draft Article 2. It was finally amended when Spiropolous' language was adopted by a vote of 10 to 3, with 1 abstention. *Id.* at 202.

94. Recall that Lauterpacht's motive for proposing "sovereignty" stemmed from his fear that without it the coastal state might lack jurisdiction over crimes on or beneath the shelf. *See supra* note 84. Recognizing this, the ILC said in its 1953 Report on draft Article 2 that, even though "sovereign rights" appears in the final version of Article 2, "the text . . . leaves no [d]oubt that the rights conferred upon the coastal State cover *all rights necessary for and connected with* the exploration and the exploitation of the . . . shelf." Report of the International Law Commission to the General Assembly, 8 U.N. GAOR, Supp. (No. 9) at 14, U.N. Doc. A/2456 (1953), *reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 200, 214 U.N. Doc. A/CN.4/SER.A/1953/Add.1 (1959).

right of foreign state military use remained in the face of a grant of "sovereignty" to coastal states, it definitely survived the change to "sovereign rights" for specific and limited purposes.[95]

1956: The eighth session of the ILC in 1956 considered two matters bearing upon the continuation of the freedom of foreign state military use of the continental shelf. The first matter involved the question of the lawfulness of conducting nuclear weapons tests on the high seas. The second involved the question of whether a foreign state should be permitted to conduct weapons tests of any sort on the water surface or in the water column of the high seas surmounting the continental shelf of another state absent that state's prior approval.

Both of these matters were initially addressed in a paper prepared

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95. Nothing here is intended to suggest that a coastal state is never entitled to take measures of security on its shelf. Certainly, though the grant of "sovereignty" or "sovereign rights" may have not been designed to confer the power to lawfully take such measures at any point in time, the inherent right of self-defense, provided for in Article 51 of the U.N. Charter, still exists and can be exercised in appropriate instances. Further, in the 1953 records of the ILC, a comment of the representative from The Netherlands, Mr. Francois, evidences additional support for the view that foreign state military use survived sovereign rights. As pointed out, Lauterpacht's proposal to vest the coastal states with "sovereignty" over the shelf generated a flurry of limiting amendments, including one from Francois himself. *See supra* note 87. However, unlike the Kozhevnikov language, it did not elicit observations concerning foreign state military use, even though its thrust was virtually the same. The Egyptian delegate Mr. el Khouri, however, was prompted to ask why the limitation was necessary. Francois indicated that once "sovereignty" was referred to it became "very important indeed to ensure the application of the doctrine of the freedom of the seas." *See* Summary Records of the 198th Meeting, [1953] 1 Y.B. INT'L L. COMM'N 88, U.N. Doc. A/CN.4/SER.A/1953 (1959). His limitation accomplished this by making it clear that "sovereignty" pertained to exploration on the shelf and exploitation of its natural resources and not to "fish and wrecks." Though Francois' proposal was later withdrawn, *see supra* note 93, draft Article 2 reported by the ILC in 1953 basically reflected its fundamental limitation.

Admittedly, the observation by Francois does not explicitly support the continuation of foreign state military use. It does, however, recognize the friction which the creation of coastal state rights in the continental shelf causes traditional freedom of the seas. Francois, as most other representatives of the ILC, recognized the need for a continental shelf doctrine, a doctrine stating governing principles *de lege ferenda*. Yet, at the same time he and others recognized that the doctrine should only create coastal state rights for a very limited set of purposes, preserving as much as possible the traditional freedoms existing *de lege lata*. The two specific traditional freedoms referred to by Francois were the right of all states to fish and to exploit wrecks. His failure to make reference to other freedoms long acknowledged to exist should not be read as indicating that only fishing and the exploitation of wrecks were to be preserved. Quite to the contrary, Francois' observation that his proposal was motivated by an interest in assuring that "sovereignty" did not encroach on the doctrine of freedom of the seas suggests that, with one exception, all traditional freedoms — including the freedom of foreign state military use — remained intact. The only exception, of course, concerned the coastal state's right to explore the shelf and exploit its natural resources. No other state could pursue that activity.

prior to the session by the Special Rapporteur who apparently felt compelled to respond to the debate taking place among international legal scholars on the general question of the lawfulness of nuclear weapons tests.[96] First, the Special Rapporteur suggested that nuclear weapons tests were a permissible use of the seas subject to the proviso that they not "unreasonably" prevent other states from enjoying their freedoms of the seas.[97] This suggestion evoked animated discussion at formal session, with some delegates contending that the proper standard was not whether such tests "unreasonably" interfered with but whether they "adversely affected" the freedoms of other states.[98] Ultimately, the ILC provided in its commentary to the 1956 draft articles that "[s]tates are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states."[99] Yet the ILC also noted that it was making no "express pronouncement" on the lawfulness of nuclear weapons tests in the context of either freedom of the seas or ocean pollution.[100] This apparent equivocation led some to conclude that the Commission had settled upon a compromise which recognized the right to use the seas for nuclear weapons tests, but only if the tests did not unreasonably interfere with the freedoms of other states.[101] Given the fact that the standard of reasonableness has invariably been applied in international law to resolve competing permissible claims, one would seem unjustified in viewing the Commission's action on this matter as designed to impair the freedom of military use.

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96. Regime of the High Seas and of the Territorial Seas, U.N. Doc. A/CN.4/97 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 1, 10 (1956) [hereinafter cited as Regime of the High Seas]. *See also* Editorial Comment, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356 (1955); Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 YALE L.J. 629 (1955); McDougal & Schlei, *supra* note 64.

97. Regime of the High Seas, *supra* note 96, at 1, 10.

98. *See* Summary Records of the 335th Meeting, [1956] 1 Y.B. INT'L L. COMM'N 8, 11-12, U.N. Doc. A/CN.4/SER.A/1956 (1956) (remarks of Mr. Pal); *id.* at 12 (remarks of Mr. Zourek of Czechoslovakia); *id.* at 13 (remarks of Mr. Amado of Brazil).

99. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) at 24, Art. 27, commentary 2, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 278, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957).

100. For action on nuclear weapons tests and freedom of the seas, see Summary Records of the 340th Meeting, [1956] 1 Y.B. INT'L L. COMM'N 32-34, U.N. Doc. A/CN.4/SER.A/1956 (1956). On ocean pollution, see *id.* at 59-63 (346th mtg.); Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) at 33-34, commentary 4, art. 48, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 285-86, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957) (providing that, in the context of ocean pollution, the question of nuclear weapons tests is a many-sided problem subject to "difficulties besetting any attempt to impose a general prohibition").

101. *See* M. MCDOUGAL & W. BURKE, *supra* note 17, at 761.

The ILC's consideration of the Special Rapporteur's second recommendation — that a proposal be adopted requiring a foreign state to obtain advance approval from a coastal state before conducting weapons tests of any sort in the waters above that state's continental shelf — is most relevant to our present inquiry concerning the freedom of foreign state military use of another's shelf. The proposal accurately reflected the tension between an activity deemed permissible freedom of the seas and the sovereign rights of a coastal state to explore the shelf and exploit its natural resources. Scientific detonation of a nuclear weapon in the water column of the high seas immediately above the continental shelf of a state could have a direct and substantial effect on that state's sovereign rights by contaminating its shelf with radiation. Thus, it was essential to design a proposal to accommodate the interests of the states involved.

Once the Commission declined to explicitly proscribe nuclear weapons tests, the Special Rapporteur suggested that the delegates consider disregarding his proposal requiring advance consent.[102] Subsequently that suggestion was followed.[103] The clear inference to be drawn is that the ILC did not wish to enlarge the shelf state's rights to include authorizing them to require advance consent from foreign states interested in using the waters of the high seas superjacent to the shelf for activities falling within the doctrine of freedom of the seas.[104] The sovereign rights of coastal states pertain to exploration and exploitation of the shelf and do not affect the waters above. Recognition of the use of nuclear weapons tests on the high seas could well encroach on the coastal states' sovereign rights much more extensively than other more limited forms of military use of the bed of the shelf. Thus, it appears the rejection of the Special Rapporteur's proposal affirms the traditional freedom of foreign state military use of another's continental shelf.

1958: Discussions at UNCLOS I in 1958 indicate that the concept of "sovereign rights," which the ILC had again approved in 1956, did not, in principle, eliminate the traditional freedom of foreign state military use.[105]

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102. Summary Records of the 359th Meeting, [1956] 1 Y.B. INT'L L. COMM'N 142, 147, 148, U.N. Doc. A/CN.4/SER.A/1956 (1956).

103. *Id.* at 148.

104. This is not to imply, however, that the ILC felt that any detonation above the shelf was lawful. The use entailed in such detonation must still be in accord with the standard of reasonableness.

105. Summary Records of the 359th Meeting, [1956] 1 Y.B. INT'L L. COMM'N 142, 146, U.N. Doc. A/CN.4/SER.A/1956 (1956). Mr. Hsu, of China, proposed that "exclusive rights" be substituted for "sovereign rights." This proposal was rejected 9 to 3, with 3 abstentions. *Id.* at 147. In retaining "sovereign rights" the ILC stated that it "was unwilling to accept the *sovereignty* of the coastal State over the seabed and subsoil of the

The Fourth Committee considered recommendations for alternatives to the term "sovereign rights."[106] One such alternative was reflected in the proposals of both Argentina[107] and Mexico[108] to grant coastal states "sovereignty" over the shelf. But, given the reluctance of the Committee's predecessor — the ILC — to adopt such a characterization, it seemed a foregone conclusion that "sovereignty" would meet with a poor reception.[109] This conclusion was made even more likely by a revealing observation by the Cuban delegate, Mr. Garcia Amador. Speaking in opposition to the Mexican and Argentine proposals, he noted that if either proposal were adopted it would be "technically a legal impossibility" for a foreign submarine to "come to rest" on another state's continental shelf.[110] The persuasive impact of this evaluation does not readily lend itself to precise assessment. Undoubtedly, however, it stiffened the resolve of those who eschewed coastal state "sovereignty," thus leading to the withdrawal of the Argentine proposal[111] and the decisive rejection of the Mexican proposal.[112]

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continental shelf." Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) at 42, commentary 2, art. 68, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 297, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957) (emphasis added).

106. The United States proposed that "sovereign rights," found in Article 68 of the ILCs 1956 draft, be changed to "exclusive rights." U.N. Doc. A/Conf.13/C.4/L.31, *reprinted in* 6 UNCLOS I, Off. Rec., *supra* note 60, at Annex 135. Sweden proposed "control and jurisdiction," A/Conf.13/C.4/L.9 *reprinted in* 6 UNCLOS I, Off. Rec., *supra* note 60, at Annex 129; The Netherlands proposed "exclusive rights," A/Conf.13/C.4/L.19/Rev.1, *reprinted in id.* Annex 131; and West Germany proposed "rights defined in article 71," A/Conf.13/C.4/L.43, *reprinted in* 6 UNCLOS I, Off. Rec., *supra* note 60, at Annex 138. The Swedish proposal was withdrawn. 6 UNCLOS I, Off. Rec., *supra* note 60, at 67 (23d mtg.). The West German proposal was rejected 52 to 7, with 6 abstentions. *Id.* at 69 (24th mtg.). The Netherlands proposal was rejected 40 to 4, with 22 abstentions. *Id.* The United States proposal was adopted by the Fourth Committee 21 to 20, with 27 abstentions. *Id.* On a proposal of Mr. Jhirad of India, in Plenary session, "sovereign rights" was — with the approval of the United States — reinstated 57 to 14, with 6 abstentions. 2 UNCLOS I, Off. Rec., *supra* note 60, at 13, 14, U.N. Doc. A/Conf. 13/SR.8. Mexico and Argentina proposed "sovereignty." *See* A/Conf.13/C.4/L.4 & L.6, *reprinted in* 6 UNCLOS I, Off. Rec., *supra* note 60, at Annex 126 and 127.

107. *See* A/Conf.13/C.4/L.4, *reprinted in* 6 UNCLOS I, Off. Rec., *supra* note 60, at Annex 126.

108. *See* A/Conf.13/C.4/L.6, *reprinted in* 6 UNCLOS I, Off. Rec., *supra* note 60, at Annex 127.

109. *See infra* notes 111 & 112.

110. *See* 6 UNCLOS I, Off. Rec., *supra* note 60, at 52-53, U.N. Doc. A/Conf. 13/C.4/SR.20 (1958).

111. 6 UNCLOS I, Off. Rec., *supra* note 60, at 55, U.N. Doc. A/Conf.13/C.4/SR.21 (1958).

112. The Mexican proposal was rejected 37 to 24, with 6 abstentions. *Id.* at 69, U.N. Doc. A/Conf.13/C.4/SR.24 (1958). The Argentine proposal was withdrawn. *See id.* at 55,

Interestingly enough, if one contrasts the statement of the Cuban delegate, Mr. Garcia Amador, with the inquiry advanced by the Chinese delegate, Mr. Hsu, during the fifth session of the ILC in 1953, there is little doubt that whatever inference can reasonably be drawn relates to the bed of the continental shelf. Mr. Hsu had earlier referred to a foreign state concealing a submarine in the "area" of the continental shelf. Since he did not distinguish concealment in the water column of the high seas from concealment on the actual bed of the shelf, one could argue, though unpersuasively, that the exchange between Hsu and Chairman Gilberto Amado only suggests that coastal state "sovereign rights" do not affect the status of the superjacent waters of the high seas. On the other hand, by explicitly referring to a foreign submarine coming "to rest" on the bed of the shelf, Garcia Amador left no doubt that in his estimation his remarks of disapproval related to foreign state military use of the continental shelf.

This simple fact alone, however, fails to demonstrate that the grant of "sovereign rights" did not destroy the traditional foreign state freedom. Surely in Garcia Amador's estimation the rejection of "sovereignty" went a considerable distance in that direction. But even when one recognizes that his opposition to "sovereignty" stemmed from the undesirable consequences it would have on a foreign state's right to use the shelf for a military purpose and that, further, this opposition was coupled with apparent support for the notion of "sovereign rights,"[113] the most that can be concluded with certainty is that Garcia Amador was satisfied that the traditional freedom of foreign state military use is not incompatible with the rights of a shelf state.

Be that as it may, the Fourth Committee's action on another quite distinct proposal indicates rather ineluctably that the grant of "sovereign rights" did not destroy the freedom of foreign state military use. That proposal was submitted by the Indian delegate, Mr. Jhirad, during the 29th meeting of the Committee.[114] In essence it was designed to add a paragraph to the language of Article 71 of the 1956 ILC draft then being considered.[115] The proposed paragraph prohibited the continental shelf of any state from being used by a foreign state or the coastal state itself "for the purpose of building military bases or installations."[116] Jhirad's proposal

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U.N. Doc. A/Conf.13/C.4/SR.21 (1958).

113. For Garcia-Amador's views on "sovereign rights," see *id.* at 52-53, U.N. Doc. A/Conf.13/C.4/SR.20. *See also id.* at 25 (11th mtg.), 69 (24th mtg.) (absention on United States proposal of "exclusive rights").

114. *See id.* at 85, U.N. Doc. A/Conf.13/C.4/SR.29 (1958).

115. Article 71 of the 1956 ILC draft ultimately became Article 5 of the 1958 Shelf Convention. Article 68 of the 1956 draft became Article 2 of the Convention.

116. *See* U.N. Doc. A/Conf.13/C.4/L.57, *reprinted in* 6 UNCLOS I, Off. Rec.,

was a refined version of a proposal submitted and later withdrawn by Bulgaria. The Bulgarian proposal contained language effectively prohibiting only the coastal state from using the shelf for such purposes.[117]

In addressing the Indian proposal, some delegates considered it closely associated with the matter of disarmament and therefore, perhaps, beyond the bailiwick of the Conference.[118] Mr. Munch, of the Federal Republic of Germany (F.R.G.), shared this view[119] but had also advanced, in criticizing the earlier Bulgarian proposal, an equally applicable additional reason for opposing the language of the Indian amendment. Specifically, he noted that "except for the express purpose of . . . exploration and exploitation of its natural resources, the continental shelf, including its subsoil, was subject to the regime of the high seas." Therefore, "[a]ny State could build installations on it, provided that they did not interference [sic] with the exploration and exploitation of natural resources."[120] Mr. Jhirad, of India, and Mr. Belinsky, of Bulgaria, did not concur with Munch's assessment. Though both acknowledged that the doctrine of freedom of the seas had applicability, they concluded that the construction of military installations on the continental shelf would violate international law.[121]

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supra note 60, at Annex 141, U.N. Doc. A/Conf.13/42 (1958).

117. The Bulgarian proposal advanced as an addition to Article 68 of the ILC's 1956 draft by Mr. Belinsky, 6 UNCLOS I, Off. Rec., *supra* note 60, at 83, U.N. Doc. A/Conf.13/C.4/SR.29 (1958), stated: "The coastal State shall not use the continental shelf for the purpose of building military bases or installations." U.N. Doc. A/Conf.13/C.4/L.41/Rev.1, *reprinted in* 6 UNCLOS I, Off. Rec., *supra* note 60, at Annex 137, U.N. Doc. A/Conf.13/42 (1958). The proposal was withdrawn at the 29th meeting in favor of Jhirad's proposal. 6 UNCLOS I, Off. Rec., *supra* note 60, at 84, U.N. Doc. A/Conf.13/C.4/SR.29 (1958).

118. *See* 6 UNCLOS I, Off. Rec., *supra* note 60, at 85 U.N. Doc. A/Conf.13/C.4/SR.29 (1958) (comments of Ms. Guttridge of the United Kingdom); *id.* at 86 (comments of Mr. Mouton of the Netherlands); *id.* at 88, U.N. Doc. A/Conf.13/C.4/SR.30 (comments of Mr. Rodriguez of Brazil); *id.* (comments of Mr. Whiteman of the United States); *id.* (comments of Mr. Van Der Essen of Belgium). Not all delegates agreed. *See id.* at 88 (comments of Mr. Nae of Romania); *id.* (comments of Mr. Ranukusumo of Indonesia); *id.* at 89 (comments of Mr. Jhirad of India); and *id.* (comments of Mr. Kanakaratne of Ceylon).

119. *Id.* at 85, U.N. Doc. A/Conf.13/C.4/SR.29 (1958).

120. *Id.* at 83, U.N. Doc. A/Conf.13/C.4/SR.28 (1958) (emphasis added).

121. Belinsky defended the Bulgarian proposal by stating that "[e]xcept for purposes of exploration and exploitation of natural resources, the continental shelf was subject to the regime of the high seas." *Id.* at 83-84, U.N. Doc. A/Conf.13/C.4/SR.29 (1958). He concluded that "[h]ence, the presence of any military installations on the continental shelf would be a violation of international law." *Id.* Jhirad defended the Indian proposal by asserting that the building of military bases or installations would violate freedom of the seas and Article 2(4) of the U.N. Charter, and interfere with the rights of exploration and exploitation. *Id.* at 85.

The Indian proposal was decisively rejected.[122] It seems probable that while some voted against the proposal out of a conviction that military use of the continental shelf was not violative of international law, others opposed it on the ground that it was outside the Committee's jurisdictional competence.

Two possible explanations exist for the rejection of the Indian proposal. Therefore, the negative vote does not necessarily imply that foreign states may, in principle, use another state's continental shelf for military purposes. After all, those who viewed the matter as beyond the Committee's jurisdictional competence may simply have intended their vote to indicate that fact and that fact alone. On the other hand, one would not seem to be reading too much into the vote if one concluded that the rejection of the Indian proposal suggests that nothing in the Shelf Convention — including the concept of "sovereign rights" — supports the idea that the traditional freedom of foreign state military use was intended to be destroyed.[123] Indeed, that it was not destroyed by the Convention seems the most obvious conclusion in view of the subsequent assessment of the international legal community that an additional convention would be needed if the objective of prohibiting the emplacement of nuclear weapons anywhere on the seabed beyond 12 miles from the shore-line of any state was to be accomplished.[124] Had the Fourth Committee destroyed the traditional freedom of military use of the continental shelf, there would have been no need for a Seabed Arms Control Treaty in 1971[125] which prohibited anything more than the emplacement of nuclear weapons on that portion of the seabed located beyond the continental shelf.

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122. *Id.* at 91, U.N. Doc. A/Conf.13/C.4/SR.30 (1958). The vote was 31-18, with 6 abstentions. *Id.*

123. It is recognized that the effect of asserting, essentially, that the rejection of the Indian proposal affirms the traditional freedom may not be different from asserting that nothing in the Convention destroys that freedom. The distinction, however, seems essential in view of the existence of two possible explanations for the negative votes.

124. This is reflected by the adoption of SACT. SACT, *supra* note 52, at arts. 1, 2, 23 U.S.T. at 704.

125. *Id.* For a contrary view, see the declaration of India in conjunction with its accession to SACT, 955 U.N.T.S. 190 (1974) (indicating that apart from the Treaty, international law prohibits foreign state use of another state's continental shelf). For the view that the Treaty cannot be read as meaning that any state has a right to use another state's continental shelf for military purposes not prohibited by the Treaty, see the declaration of Canada, *id.* at 189. The statement above is not inconsistent with the Canadian declaration since it simply provides that the 1958 Geneva Convention confirms the traditional freedom of use, and the Seabed Treaty would not have been required had that freedom not existed.

(b) Matter of Foreign State Scientific Research

Article 5(8) of the Shelf Convention provides that a foreign state interested in conducting "any research concerning the continental shelf" must first obtain advance approval of the coastal state.[126] The breadth of the term "any" would surely include nonmilitary and military scientific research regarding the seabed and subsoil of the continental shelf. Accepting this premise, the range of military activities covered by Article 5(8) would run the gamut from exploitation of mineral resources under the guise of military scientific research to, perhaps, scientific research designed to ascertain the effects on the continental shelf of certain military undertakings. However, the very fact that Article 5(8) requires advance approval of foreign state research might generate reluctance to accept the assessment of Article 2(1) described above.[127] A common sense approach would suggest that the Shelf Convention deems foreign state military use of another state's continental shelf as unlawful if simple, peaceful research cannot even be conducted without having been approved in advance by the coastal state.[128] Discussions surrounding the adoption of Article 5(8), however, suggest that this approach may not be accurate.

The ILC's 1956 commentary to Article 2's predecessor — Article 68 — contains the first significant reference to the matter of foreign state research. In that commentary a distinction was drawn between "scientific research" and research "relating to the exploration or exploitation of the seabed or subsoil," with only the latter being subject to advance approval of the coastal state.[129] The Shelf Convention of 1958, quite obviously, does not continue that distinction.[130] Rather, it contains a prescription for advance approval for a broad spectrum of research activities.

The language of advance approval contained in Article 5(8) found its way into the Convention when a proposal by the French delegate, Mr.

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126. 1958 Continental Shelf Convention, *supra* note 14, at art. 5, para. 8, 15 U.S.T. at 474, 499 U.N.T.S. at 316.

127. *See supra* text accompanying notes 81-125.

128. *See* Gehring, *supra* note 16, at 193-94.

129. *See* Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) at 42, commentary 10, art. 68, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 298, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957). The commentary was prepared in response to the suggestion of the Special Rapporteur Mr. Francois, who had indicated that research "bearing on the exploration or exploitation of the seabed or subsoil" should be made subject to advance consent. *Regime of the High Seas, supra* note 96, U.N. Doc. A/CN.4/97, *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 11, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957).

130. *See* 1958 Continental Shelf Convention, *supra* note 14.

Patey,[131] was adopted by the Fourth Committee[132] at UNCLOS I in, essentially, verbatim form.[133] The basic concept of advance approval, however, was not new. The Indonesians put forward the concept earlier in the Conference, but in the form of an addition to the ILC's 1956 draft of Article 71(1), predecessor to Article 5(1).[134] In opening that earlier proposal for consideration, the Indonesian delegate, Mr. Ranukusumo, stated quite unequivocally that it was "in no sense intended to cover nuclear tests or similar activities."[135] Given the fact that Indonesia had supported the Three Power Proposal to prohibit military maneuvers near another state's coast,[136] it would seem Ranukusumo's comment was intended to suggest nothing more than that "nuclear tests and similar activities" were not subject to advance coastal state approval and could be conducted if viewed as in accord with international law. Surely, Indonesia's position on military maneuvers made it extremely unlikely that Ranukusumo meant to suggest any official view on this latter point.

The Indonesian proposal to add language to the ILC's Article 71(1) was ultimately rejected.[137] Nevertheless, Ranukusumo's comment is relevant to understanding the significance of the French proposal for several reasons. First, both the French and the Indonesian proposals shared the same basic objective: increase coastal state authority over the shelf by requiring foreign states to obtain consent before undertaking any form of research. Second, in submitting the French proposal, Mr. Patey approvingly referred to the proposal submitted earlier by his colleague from Indonesia.[138] Finally, after having had the benefit of Ranukusumo's observation about what the Indonesian language was not intended to

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131. U.N. Doc. A/Conf.13/C.4/L.56, *reprinted in* 6 UNCLOS I, Off. Rec., *supra* note 60, at Annex 141, U.N. Doc. A/Conf.13/42 (1958).

132. It was adopted 30 to 17, with 6 abstentions. 6 UNCLOS I, Off. Rec., *supra* note 60, at 90-91, U.N. Doc. A/Conf.13/C.4/SR.30 (1958).

133. The language of the French proposal was identical to that of Article 5(8) as adopted, except that the final reference to "research" in the proposal read "researches."

134. The Indonesian proposal also required consent in all instances. U.N. Doc. A/Conf.13/C.4/L.53, *reprinted in* 6 UNCLOS I, Off. Rec., *supra* note 60, at Annex 140, U.N. Doc. A/Conf.13/42 (1958).

135. *See* 6 UNCLOS I, Off. Rec., *supra* note 60, at 83, U.N. Doc. A/Conf.13/C.4/SR.29 (1958).

136. Indonesian support of the Three Power proposal, U.N. Doc. A/Conf.13/C.2/L.32, *reprinted in* 4 UNCLOS I, Off. Rec., *supra* note 60, at Annex 124, U.N. Doc. A/Conf.13/40 (1958), to prohibit foreign state military maneuvers and weapons practice near another state's coast is evident in its favorable vote on that proposal. 4 UNCLOS I, Off. Rec., *supra* note 60, at 54, U.N. Doc. A/Conf.13/C.4/SR.21 (1958).

137. The vote was 23 to 10 with 22 abstentions. 6 UNCLOS I, Off. Rec., *supra* note 60, at 90, U.N. Doc. A/Conf. 13/C.4/SR.31 (1958).

138. *See id.* at 84, U.N. Doc. A/Conf.13/C.4/SR.29 (1958).

affect, Mr. Patey did not attempt to disassociate the language he was advancing from Ranukusumo's observation, but rather explained it was only intended to insure that exploration and exploitation were not "carried out on the pretext that they constituted scientific research."[139] Had Patey desired to signify that his proposal required a foreign state to obtain advance approval before conducting "nuclear tests or similar activities" he would certainly have said so.

Two conclusions seem to proceed from all of this. One is that, while the drafters of Article 5(8) desired to subject all research regarding the seabed and subsoil of the continental shelf to advance coastal state consent, they did not intend that nuclear tests and similar activities on the continental shelf be subject to advance approval by the coastal state. The other conclusion, which is clearly much more important for our purposes here, is that it seems as though there was a recognition by those concerned with this matter that, notwithstanding the establishment of a requirement that peaceful, innocent research be subject to advance approval by the coastal state, any foreign state military use permitted by international law could be undertaken on a coastal state's shelf without fear of restriction. Article 5(8) by its very terms deals only with research "concerning" the continental shelf. This language suggests the scope of activities which the drafters intended the provision to address expressly and by implication. The focus is clearly on activities directed at the seabed and subsoil of the continental shelf. Since it is not possible to view nuclear tests or military uses directed at the military forces of the coastal state as undertakings "concerning" the continental shelf, it would seem incorrect to view such efforts as inconsistent with the requirement of advance approval of foreign state research. Had the requirement of advance approval been seen as the last and most persuasive bit of evidence suggesting that foreign states could not use another state's shelf for military purposes, Article 5(8) would not have been so drafted. Furthermore, Mr. Ranukusumo would not have indicated that "nuclear tests and similar activities" could be undertaken without being subject to advance approval if they were in accord with international law.

2. Limitations on Foreign State Military Use

Even though the evidence supports the notion that the freedom of foreign state military use has not, in principle, been destroyed by the grant of "sovereign rights," the practical question arises whether the state may exercise the freedom lawfully if it interferes with those rights of another

139. *Id.*

state. Two positions have been expressed on this matter. At one extreme is the view that certain kinds of military uses may lawfully continue to be undertaken, even though interference occurs, because such uses prevail over the "sovereign rights" of the coastal state.[140] This view may be supported by the language of the Shelf Convention itself.[141] As the argument goes, some military uses either involve or can be assimilated to navigation or the laying of cables or pipelines.[142] To the extent that this is so, Articles 4 and 5(1) of the Shelf Convention would seem to indicate that these military uses prevail over the "sovereign rights" of the coastal state.[143] At the other extreme is the view that all foreign state military uses cross the legal threshold and become unlawful the moment they begin to interfere with the "sovereign rights" of the coastal state.[144] Persuasive authority for the latter position is apparently found in the earlier referenced comment by Mr. Munch, of the F.R.G., that the continental shelf of another state is subject to all of the freedoms of the seas — including the freedom of military use — provided there is no interference with the "sovereign rights" of that state.[145] Each of these two positions will be examined to determine which, if either, accurately reflects current international law.

(a) Certain Kinds of Military Uses Prevail

In pertinent part, Articles 4 and 5(1) of the Shelf Convention provide,[146] respectively, as follows:

> Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal state may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf.
>
> . . .
>
> The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of living resources of the sea.

The basic contention advanced is that the foreign state freedoms

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140. *See* Treves, *supra* note 19, at 837.

141. *Id.*

142. *Id.*

143. *Id.*

144. *See* Rao, *Legal Regulation of Maritime Military Uses*, 13 INDIAN J. INT'L L. 425, 449 (1973); Brown, *Legal Regime of Inner Space*, 22 CURRENT LEGAL PROBS. 181, 186 (1969).

145. *See supra* text accompanying notes 118-21.

146. *See* 1958 Continental Shelf Convention, *supra* note 14.

referred to by these provisions are freedoms long recognized by customary international law; that the grant of "sovereign rights" to the coastal state is a limited exception to these freedoms and, therefore, must be viewed restrictively; and that the language in the 1969 *North Sea Continental Shelf Cases*[147] observing that these freedoms are mentioned in Articles 4 and 5(1) "to insure that they were not *prejudiced* by the exercise of the continental shelf rights as provided for in the Convention"[148] confirms the restrictive reading and leads to the conclusion that the freedoms prevail over the coastal state's rights.[149] Taking this analysis one step further, it is maintained that military uses which can be assimilated to the freedoms of "navigation" or the laying of "cables" or "pipelines" should therefore prevail as well. There appear, however, to be two fundamental deficiencies with this argument. First, the records of the International Court of Justice (ICJ) in the 1969 *North Sea Cases*, and those reported at UNCLOS I, do not support efforts to assimilate to "navigation," "cables," or "pipelines" military uses which are not within those terms as they are commonly understood. And secondly, the same records also suggest that even activities irrefutably within those terms do not prevail in every case of conflict with the "sovereign rights" of the coastal state.

(i) Assimilation to Navigation, Cables, or Pipelines

As described earlier,[150] Article 2 of the High Seas Convention provides the affirmative treaty source for the existence of the freedoms applicable to the bed as well as the waters beyond the bed and waters of territorial seas of other states.[151] Article 2(1) of the Continental Shelf Convention declares, however, that the coastal state alone is vested with "sovereign rights" to explore and exploit the resources found in that portion of the bed constituting its continental shelf. This may well be a derogation from the doctrine of freedom of the seas if Article 2 of the High Seas Convention is read as affirming the right of all states to undertake activities of exploration and exploitation anywhere on the bed beyond the territorial seabed of other states.[152] Nevertheless, given the limited nature

147. North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) 1969 I.C.J. 12.

148. *Id.* at 39-40.

149. Reply to Zedalis, *Military Installations, Structures and Devices on the Continental Shelf: A Response*, 75 AM. J. INT'L L. 926, 933 (1981).

150. *See supra* notes 66-78 and accompanying text.

151. *Id.*

152. *See* 1 T. KRONMILLER, THE LAWFULNESS OF DEEP SEABED MINING 106-07, 164-72, 349-84 (1980) (intimating that had the Shelf Convention not been adopted, the entire bed beyond the territorial seabed would have been *res nulluis* and subject to exploitation by

of the grant of "sovereign rights," Article 2(1) of the Shelf Convention in no way diminishes the other freedoms, possessed by all to use another state's continental shelf for catching nonsedentary species of fish, laying submarine cables or pipelines, or engaging in any other undertaking — including that of a military nature — protected by its reference to "*inter alia.*"[153]

The representatives of the international legal community recognized that the grant of "sovereign rights" to the coastal state to explore the shelf and exploit its natural resources might conflict with the right of other states to pursue other freedoms affirmed by Article 2 of the High Seas Convention.[154] This recognition led to the formulation of Articles 4 and 5(1) of the Shelf Convention.[155] These articles set forth specific standards for resolving conflicting claims. The Articles are not designed to provide an enumeration of the freedoms which foreign states may exercise on another state's continental shelf, for that appears in Article 2 of the High Seas Convention.[156]

Two conclusions flow from the relationship between Article 2 of the High Seas Convention and Articles 2(1), 4 and 5(1) of the Continental Shelf Convention. The most obvious, although there is no language referring to military uses in Articles 4 and 5(1), is that one should not conclude that foreign states are not entitled to conduct military uses on another state's continental shelf.[157] Again, the freedom derives from Article 2 of the High Seas Convention, not Articles 4 and 5(1) of the Shelf Convention.[158] Less obvious, but more important for present purposes, is that the terms "navigation," "cables," and "pipelines" in Articles 4 and 5(1) mean only navigation, cables, and pipelines. Military activities or objects not within those terms as commonly understood may not be assimilated thereto.

With special reference to the latter point, since Article 2 of the High

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any state).

153. As explained earlier, *see supra* text accompanying notes 69-78, the freedoms of the seas apply to the entire bed beyond the territorial seabed of other states. By granting the coastal state "sovereign rights" over natural resources, e.g., minerals and sedentary species of fish, only the freedoms of fishing for nonsedentary species, laying submarine cables or pipelines, and engaging in activities within the reference to "inter alia" remain to be exercised by foreign states on another's continental shelf.

154. M. McDOUGAL & W. BURKE, *supra* note 17, at 691-92.

155. 1958 Continental Shelf Convention, *supra* note 14, at arts. 4, 5, para. 1, 15 U.S.T. at 473, 499 U.N.T.S. at 314.

156. 1958 High Seas Convention, *supra* note 14, Art. 2, 13 U.S.T. 2312, 450 U.N.T.S. 82.

157. *See supra* note 155.

158. *See supra* note 156.

Seas Convention contains the affirmative treaty statement of the existence of freedoms exerciseable on the bed beyond the territorial seabed of other states, it would seem that any effort to ascertain the meaning of the undefined terms "navigation," "cables," and "pipelines" should begin with the *travauxs* relevant to that provision. The earliest efforts to develop a list of freedoms corresponding with those set forth in Article 2 began at the seventh session of the ILC in 1955.[159] Nothing in the records of that session,[160] or the subsequent session in 1956,[161] however, is particularly helpful in determining whether military uses may be assimilated to any of the three terms. Delegates to the Commission who used the terms during the 1955 and 1956 sessions did so only in the sense in which they are commonly understood.[162] But this does not indicate whether they thought military uses not clearly within "navigation," "cables," or "pipelines" could be undertaken because the uses might be assimilated thereto. The records of the Second Committee of UNCLOS I in 1958, though, are a bit more illuminating. In fact the Committee's reaction to two earlier proposals which were designed to prohibit certain military uses of the high seas[163] reveals a great deal about this interpretative question.

The specific proposals were advanced by the Soviet-bloc and dealt with prohibitions to be considered by the Committee in the context of Article 2's predecessor, Article 27 of the ILC's 1956 draft convention. The first, known as the Three Power Proposal, prohibited military maneuvers and weapons practice. The second, known as the Four Power Proposal, declared nuclear test detonations on the high seas to be a violation of international law.[164] The Committee refused to endorse either of the proposals.[165] Since weapons practice and nuclear test detonations are outside even the most expansive understanding of "navigation," "cables," or "pipelines," the Committee's refusal suggests that the delegates must have viewed the activities against which the proposals were directed as

159. Summary Records of the 293d Meeting, [1955] 1 Y.B. INT'L L. COMM'N 57-59, U.N. Doc. A/CN.4/SER.A/1955 (1960); Report of the International Law Commission to the General Assembly, 10 U.N. GAOR, Supp. (No. 9) at 3, art. 2, U.N. Doc. A/2934 (1955), *reprinted in* [1955] 2 Y.B. INT'L L. COMM'N 19, 21, U.N. Doc. A/CN.4/SER.A/1955/Add.1 (1960).

160. Summary Records of the 283d, 284th, 293d and 300th Meetings, [1955] 1 Y.B. INT'L L. COMM'N 4-7, 8-9, 57-59, 105, U.N. Doc. A/CN.4/SER.A/1955 (1960).

161. Summary Records of the 339th and 340th Meetings, [1956] 1 Y.B. INT'L L. COMM'N 29-35, U.N. Doc. A/CN.4/SER.A/1956 (1956).

162. *See supra* notes 160-61.

163. *See supra* notes 72 & 73 (the Three and Four Power Proposals).

164. *Id.*

165. *See supra* note 71.

within Article 27's reference to "*inter alia*."[166] The accuracy of this impression is strengthened by the view of Mr. Hlaing, of Burma, a supporter of the Four Power Proposal. He suggested that "*inter alia*" might well serve to justify continued use of the high seas for test detonations if no specific prohibition were to be adopted by the Committee.[167] Beyond even this terribly important impression, it would seem that if the delegates viewed Article 27's reference to "*inter alia*" as the basis for the right to undertake military uses, they probably felt the accompanying terms "navigation," "cables," and "pipelines" were to be given their most commonly understood meaning. This same conclusion should obtain whether these terms appear in Article 2's predecessor, Article 27, or in Articles 4 and 5(1) of the Continental Shelf Convention.[168]

Admittedly this conclusion is purely inferential. The drafters of Article 2 of the High Seas Convention and Articles 4 and 5(1) of the Shelf Convention indeed may have felt that military undertakings not within the terms "navigation," "cables," or "pipelines" as commonly understood could, nevertheless, be assimilated thereto. Accepting this reading, one is still not impelled to conclude that Articles 4 and 5(1) provide that military undertakings which have been assimilated to one of the three terms prevail over conflicting activities pursued by the coastal state.

As we have seen,[169] the argument that some foreign state military uses do prevail is based on the ICJ's statement in the *North Sea Continental Shelf Cases* that Articles 4 and 5(1) were mentioned in the Convention "to insure that they were not prejudiced by the exercise of the continental shelf

166. Indeed not one delegate argued that the activities fell within the terms "navigation," "cables," or "pipelines." *See* 4 UNCLOS I, Off. Rec., *supra* note 60, at 43-49, 52-55, U.N. Doc. A/Conf.13/40/SR.17-18, 20-21 (1958).

167. *See* 4 UNCLOS 1, Off. Rec., *supra* note 60, at 17, U.N. Doc. A/Conf.13/C.2/SR.9 (1958).

168. The history of the development of Articles 4 and 5(1) suggest nothing to the contrary. For instance, all references to "cables" and "pipelines" found in the records of the ILC from 1951-1956 suggest the terms were viewed as having only their common meaning. On the 1951 third session, see Summary Records of the 114th Meeting, [1951] 1 Y.B. INT'L COMM'N 278, U.N. Doc. A/CN.4/SER.A/1951 (1951) (comment of Mr. Yepes); *id.* at 280 (comment of Mr. Alfaro); *id.* (115th mtg.) (comment of Mr. Hudson); *id.* at 281 (comments of Messers. el-Khoury and Cordova). On the 1953 fifth session, see Report of the International Law Commission to the General Assembly, 8 U.N. GAOR, Supp. (No. 9) at 13, U.N. Doc. A/2456 (1953), *reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 200, 213, U.N. Doc. A/CN.4/SER.A/1953/Add.1 (1959). On the 1956 eighth session, see Summary Records of the 360th Meeting, [1956] 1 Y.B. INT'L L. COMM'N 149, 150, U.N. Doc. A/CN.4/SER.A/1956 (1956) (comments of Mr. Francois and Mr. Pal). At the meetings of the Fourth Committee of UNCLOS I, the absence of contrary statements continued. *See* 6 UNCLOS I, Off. Rec., *supra* note 60, at 79, U.N. Doc. A/Conf.13/C.4/SR.27 (1958) (comment of Mr. Moreno).

169. *See supra* notes 147-49 and accompanying text.

rights as provided for in the Convention."[170] It should be borne in mind that the principal issue before the ICJ in that case was whether the equidistance method of dividing a continental shelf shared by several states had, by virtue of its inclusion in Article 6 of the Shelf Convention, become crystallized as a rule of customary law which was obligatory on the F.R.G., notwithstanding the fact that it was not a state party to the Convention itself.[171] There was no dispute about coastal state exploration and exploitation which conflicted with navigation, fishing, or the laying of submarine cables or pipelines. Nevertheless, the Court did note that while the rule enunciated in Article 6 had not yet been received into the corpus of customary international law, Articles 4 and 5(1) of the Convention contained rules which had.[172]

What is the significance of the Court's statement given this background? Most obviously, the statement is pure *dictum*. The opinion of the ICJ itself specifically noted as much just four paragraphs earlier in providing that "it should be clearly understood that in the pronouncements the Court makes on [the issues at hand] it has in view solely the limitation provisions (Article 6) of the Convention, not other parts of it, nor the Convention as such." Dictum can be instructive, but since it is not meant to resolve a controversy which has been joined by fully aired opposing points of view it may well be expressed in terms which have been selected with something less than the circumspection accorded judicial pronouncements of law. Thus, one should hesitate before ascribing to those terms consequences of appreciable significance.

Even if one accepts that the Court labored over each word used in the opinion and concludes that the dictum appearing has precedential value, the statement focused on in this specific instance may not have the meaning which some have suggested. Again, the statement reads that Articles 4 and 5(1) were mentioned "to insure that they were not prejudiced by the exercise of the continental shelf rights as provided for in the Convention." Observe that the period does not follow the words "continental shelf rights." Rather, it follows the words "continental shelf rights *as provided for in the Convention.*" As those rights are provided for in the Convention, the coastal state is prohibited from impeding the laying of submarine cables or pipelines, "subject to its right to take *reasonable measures*" for exploration and exploitation. Furthermore, the coastal state is also prohibited from causing "*unjustifiable interference*" with navigation or

170. *Id.*

171. *See* North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) 1969 I.C.J. 12, at 38-40.

172. *Id.*

fishing. Thus, what the Court really may have been suggesting is that coastal state measures considered "unreasonable" or which cause "unjustifiable interference" prejudice the rights referred to in Articles 4 and 5(1) and must give way to those rights. But measures which can be considered "reasonable" or which do not cause "unjustifiable interference" cannot possibly be viewed as prejudicing the rights of the foreign state.

To be sure, however, the language used by the ICJ suggests that one should be cautious in characterizing even this reading as apodictic. The reference to "as provided for in the Convention" may be designed to indicate something quite antithetical to the idea that coastal state measures of exploration and exploitation which are considered "reasonable" or which do not cause "unjustifiable interference" will not be viewed as prejudicing the rights of foreign states. Specifically, the reference may suggest that even coastal state measures of that sort may not be permitted to prejudice (i.e., interfere with) the rights of navigation, fishing, or the laying of submarine cables or pipelines. The precise meaning intended by the Court is difficult to ascertain. But if one assumes that ICJ pronouncements of law derive from accurate interpretation of the underlying principles, clarity can be brought to the Court's pronouncement by analyzing the *travauxs* pertaining to Articles 4 and 5(1). This analysis suggests that the Court's statement means that "reasonable" measures not causing "unjustifiable interference" do not prejudice a foreign state's rights of navigation, fishing, and laying of submarine cables or pipelines.

(ii) Resolving Conflicts Under Articles 4 and 5(1) of the Shelf Convention: 1950-1958

1950: Beginning with the second session of the ILC in 1950, international jurists sought to articulate a standard for accommodating exploration and exploitation by the coastal state with those freedoms left unaffected by the grant of "sovereign rights." The two freedoms which drew special attention were navigation and fishing. Separate proposals were advanced during the second session,[173] but the one submitted by Mr.

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173. Mr. Hudson of the United States proposed that exploration and exploitation be considered lawful as long as such activities "do not affect" navigation or fishing. Summary Records of the 67th Meeting, [1950] 1 Y.B. INT'L L. COMM'N 218-19, U.N. Doc. A/CN.4/SER.A/1950 (1957). He later changed the language to "must not substantially affect." *Id.* at 219. Mr. Sandstrom of Sweden proposed the language "seriously affect." *Id.* at 218. Mr. Brierly of the United Kingdom proposed "must reduce to a minimum" the obstacles to navigation and fishing. *Id.* at 224. Mr. Hsu of China proposed that the resource related activities must "avoid affecting" the high seas freedoms. *Id.* Mr. Kerno from the U.N. Legal Department proposed no "excessive impediment." *Id.* Prior to the second session, Mr. Francois of the Netherlands had proposed no "appreciable repercussions." Report on the

Hudson, of the United States, was found most acceptable. In essence, it provided that exploration and exploitation were lawful so long as they did not "substantially affect" navigation or fishing.[174] The language ultimately reported by the Commission at the conclusion of the 1950 session provided that coastal state activities could interfere with navigation and fishing only to the extent that the interference was "strictly necessary" to exploration and exploitation.[175] The difference however, was simply one of form. Both sets of language envisioned a hierarchy. Specifically, in every instance in which coastal state activities either "substantially affect[ed]" navigation or fishing or created interference not "strictly necessary" to exploration and exploitation, the freedom of navigation or fishing would prevail.

1951: At its third session in 1951, the ILC again dealt with the matter of accommodation of resource-related activities of the coastal state with navigation and fishing by others. Additionally, it tried its hand at formulating a second standard to accommodate "sovereign rights" and the laying of submarine cables. The end products were Articles 5 and 6(1), respective predecessors to Articles 4 and 5(1) of the 1958 Convention.

The language appearing in Article 6(1) of the 1951 draft resulted from a proposal submitted by Mr. Hudson[176] which was altered to provide that exploration and exploitation were lawful as long as they did not produce "substantial interference" with navigation or fishing.[177] Article 5, also resulting from a proposal of Mr. Hudson,[178] provided that the

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Regime of the High Seas, U.N. Doc. A/CN.4/17 (1950), *reprinted in* [1950] 2 Y.B. INT'L L. COMM'N 102, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (1957).

174. Summary Records of the 670th Meeting, [1950] 1 Y.B. INT'L L. COMM'N 219, U.N. DOC. A/CN.4/SER.A/1950 (1957).

175. *See* Report of the International Law Commission to the General Assembly, U.N. Doc. A/1316, *reprinted in* [1950] 2 Y.B. INT'L L. COMM'N 364, 365, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (1957).

176. Hudson's proposal originally prohibited "substantial interference with navigation along established traffic routes." *See* Summary Records of the 115th Meeting [1951] 1 Y.B. INT'L L. COMM'N 282, para. 32, U.N. Doc. A/CN.4/SER.A/1951 (1957). In his estimation, the construction of installations on the water surface and the resource of regulations requiring foreign ships to sail around them would not amount to "substantial interference," *id.* at para. 34. As a result, Francois urged, *id.* at para. 35, that reference to "established traffic routes" be deleted. The effect would make it clear that the "substantial interference" test had general application. Hudson agreed to this suggestion. *Id.* para. at 36. Interestingly enough, Francois also suggested that the "substantial interference" test could be violated by coastal state activities which "hampered" navigation. *Id.* at para. 35.

177. Report of the International Law Commission to the General Assembly, 6 U.N. GAOR, Supp. (No. 9) at 19, U.N. Doc. A/1858, art. 6, para. 1, *reprinted in* [1951] 2 Y.B. INT'L L. COMM'N 123, Annex 141, at 142, U.N. Doc. A/CN.4/SER.A/1951/Add.1 (1957).

178. Summary Records of 114th Meeting, [1951] 1 Y.B. INT'L L. COMM'N 277, U.N. Doc. A/CN.4/SER.A/1951 (1957) (proposing that coastal state rights may not affect the

establishment or maintenance of cables could not be prohibited, "[s]ubject to the right of [the] coastal state to take reasonable measures for the exploration of the shelf and the exploitation of its natural resources."[179] Juxtaposing the "substantial interference" standard with that of "reasonable measures" makes it quite obvious that two distinct approaches were set forth by the ILC. Article 6(1) continued the hierarchical approach developed in 1950.[180] If the extent of the interference was substantial, navigation and fishing would prevail. The commentary to Article 6(1) confirmed this by characterizing navigation and fishing as the "primary interest."[181] Article 5, on the other hand, clearly established a different approach.[182] Assessment of the extent of interference would not alone suggest whether the laying of cables should prevail over coastal state resource-related activities. The determinative matter was whether the interference could be considered "reasonable."[183]

There is more support for reading Article 5 of the 1951 draft as articulating a balancing test than just a comparison with the terms of Article 6(1). During the Commission's consideration of the Hudson proposal, which contained the "reasonable measures" test, the representative from Mexico, Mr. Cordova, asked how a conflict between the rights of the coastal state and the laying of the cables or pipelines would be

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status of the right to lay cables or pipelines "subject to the right of the coastal State to take reasonable measures in connection with the exploitation of the natural resources"). Note that this language was proposed as an amendment to Article 3 of a 1951 draft proposal of Mr. Francois. Article 3 of that draft, however, was renumbered Article 5, *id.* at 277.

179. Report of the International Law Commission to the General Assembly, 6 U.N. GAOR, Supp. (No. 9) at 19, art. 5, U.N. Doc. A/1858 (1951), *reprinted in* [1951] 2 Y.B. INT'L L. COMM'N 123, Annex 141, at 142, U.N. Doc. A/CN.4/SER.A 1951/Add.1 (1957).

180. *See supra* text accompanying notes 173-75.

181. Report of the International Law Commission to the General Assembly, 6 U.N. GAOR, Supp. (No. 9) at 19, U.N. Doc. A/1858, comment 1, art. 6, para. 1, *reprinted in* [1951] 2 Y.B. INT'L L. COMM'N 123, Annex 141, at 142, U.N. Doc. A/CN.4/SER.A/1951/Add.1 (1957).

182. Report of the International Law Commission to the General Assembly, 6 U.N. GAOR, Supp. (No. 9) at 19, art. 5, U.N. Doc. A/1858 (1951), *reprinted in* [1951] 2 Y.B. INT'L L. COMM'N 123, Annex 141, at 142, U.N. Doc. A/CN.4/SER.A 1951/Add.1 (1957).

183. Theoretically, it would seem that there might be instances where it would be a "reasonable measure" to exclude foreign cables. In this context, comment 1 to Article 5, *supra* note 179, seems to provide a rather inconsistent observation. Specifically, it states that a coastal state "may not exclude the laying of submarine cables by non-nationals." *Id.* Construed in line with the "reasonable measures" test, the seeming prohibition may simply be designed to prevent out-of-hand exclusions not supportable under an assessment of the facts.

resolved.[184] Francois, of The Netherlands, who himself had advocated a "reasonable measures" approach in his 1950 report on the *Regime of the High Seas*,[185] suggested that it would be resolved by recognizing the "priority" rights of the coastal state.[186] The French representative, Mr. Scelle, objected. In his estimation, recognizing coastal state priority would destroy freedom of the seas.[187] Clearly, this observation had merit, thus leading Francois, with Mr. Brierly, the Chairman, to state that Scelle's attitude was "in direct contradiction" with the principle that recognition of the coastal state's rights would leave the status of the shelf and superjacent waters unaffected.[188] Considering both of Francois' remarks, it seems apparent his reference to "priority" suggested nothing more than that the rights of the coastal state may, in some instances, prevail over the right to lay cables or pipelines. When those instances would occur would depend upon a balancing approach. Had he viewed the rights of the coastal state as having the "priority," his remarks with Brierly would have noted the accuracy of Scelle's observation.

The discussion surrounding the Commission's actions with respect to the term "pipelines" provides additional support for this view of Article 5. The original proposal applied the "reasonable measures" standard to conflicts between activities of the coastal state and the laying of cables or pipelines by foreign states.[189] When the Commission concluded that the reference to "pipelines" should be deleted because the technology for laying them on the shelf had not yet sufficiently developed,[190] the American representative, Mr. Hudson, urged the removal of the "reasonable measures" standard. In his view, that test applied to pipelines and not to cables.[191] Francois joined the representative from Panama, Mr. Alfaro, in insisting upon retention of the test. Both of these representatives urged retention of the test because in some instances "cables might hamper the exploitation of the continental shelf."[192] Ultimately, the "reasonable measures" language was retained. Had Hudson's urging been heeded,

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184. Summary Records of the 114th Meeting, [1951] 1 Y.B. INT'L L. COMM'N 277, U.N. Doc. A/CN.4/SER.A./1951 (1957).

185. *See supra* note 173.

186. Summary Records of the 114th Meeting, [1951] 1 Y.B. INT'L L. COMM'N 277, U.N. Doc. A/CN.4/SER.A./1951 (1957).

187. *Id.* at 278, 279.

188. *Id.* at 279.

189. *See supra* note 178.

190. Summary Records of the 115th Meeting, [1951] 1 Y.B. INT'L L. COMM'N 281, U.N. Doc. A/CN.4/SER.A/1951 (1957).

191. *Id.*

192. *Id.*

however, the right to lay cables would surely have prevailed over conflicting resource-related activity. As it finally developed, the retention of the "reasonable measures" test provided a standard to deal with instances where cables hampered exploitation of the shelf. Specifically, exploitation could prevail in those instances where measures effecting it were viewed as "reasonable." The reasonableness of the measures could only be determined by balancing the competing interests involved.[193]

1953: The fifth session of the ILC in 1953 produced a dramatic reversal in the approach taken to accommodate coastal state rights with the freedoms of navigation and fishing. The 1951 standard of "substantial interference" was abandoned in favor of a standard which characterized coastal state activities as unlawful only when they resulted in "unjustifiable interference" with navigation and fishing.[194] No similar reversal occurred with respect to the standard for accommodating coastal state rights with the freedom to lay cables. The "reasonable measures" test appeared once more, again with no mention made of its applicability to "pipelines."[195]

A review of the records of the fifth session suggests the representatives fully appreciated that the 1953 draft of Articles 5 and 6(1) provided for a balancing rather than a rigid hierarchical approach to resolving conflicting claims. Several proposals were advanced concerning Article 6(1), including "unreasonable interference" by Lauterpacht, of the United Kingdom,[196] and Pal, of India,[197] and "unjustified" interference by Francois, of The Netherlands.[198] Pal's proposal was ultimately adopted after he

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193. One point of confusion may arise after looking at commentary 1 to Article 5. It indicates that the coastal state "may not exclude the laying of submarine cables." Report of the International Law Commission to the General Assembly, 6 U.N. GAOR, Supp. (No. 9) at 19, U.N. Doc. A/1858, commentary 1, art. 5, *reprinted in* [1951] 2 Y.B. INT'L L. COMM'N 123, Annex 141, at 142, U.N. Doc. A/CN.4/SER.A/1951/Add.1 (1957). Taken literally, this would mean there is a limit to the balancing test, i.e., if a conflict occurs the coastal state may not exclude foreign cables. Actually, if one is to give meaning to the balancing test it must envision exclusion even in some extreme cases. Thus, the language of the comment should be read as dealing only with arbitrary exclusions. *See infra* text accompanying notes 209-10.

194. Report of the International Law Commission to the General Assembly, 8 U.N. GAOR, Supp. (No. 9) at 13, art. 6, para. 1, U.N. Doc. A/2456 (1953), *reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 200, 213, U.N. Doc. A/CN.4/SER.A/1953/Add.1 (1959).

195. *Id.* at art. 5.

196. Summary Records of the 200th Meeting, [1953] 1 Y.B. INT'L L. COMM'N 102, U.N. Doc. A/CN.4/SER.A/1953 (1959).

197. *Id.* at 109 (201st mtg.).

198. *Id.* at 104 (201st mtg.). The language "substantial interference" was supported by Cordova of Mexico, *id.* at 102 (200th mtg.) (later, however, he stated that he "welcomed" Lauterpacht's proposal, *id.* at 103), Kozhevnikov of the Soviet Union, *id.* at 103, Zourek of Czechoslovakia, *id.*, and Amado of Brazil, *id.* at 104 (201st mtg.).

changed "unreasonable" to "unjustifiable."[199] This change did not occur however, before Lauterpacht had insisted that "exploration of the seabed on a large scale . . . in some cases might justify substantial interference" with navigation and fishing[200] and Francois had stated that "sometimes" those two freedoms might have to yield to coastal state rights since "[i]t would be impossible always to give [navigation and fishing] precedence."[201] The commentary accompanying Article 6(1) supports this view. In essence, it virtually repeats Lauterpacht's words and notes that this position is acceptable because of the "relative importance of the needs and interests involved."[202]

Very little discussion occurred before Article 5 was unanimously adopted.[203] The Special Rapporteur, Mr. Francois, however, did call to the attention of his colleagues that, following the 1951 session, the Danish government had transmitted a letter to him suggesting that some indication should appear in Article 5 on whether the rights of the coastal state or the freedom of other states to lay cables would prevail in cases of conflict.[204] Francois stated that in his estimation no modification to Article 5 was necessary.[205] Given the views he expressed during the 1951 session, his position on the Danish comment was quite predictable. Article 5 established a balancing approach and one could not determine in advance how the balance would tip.[206] Mr. Yepes, of Colombia, expressed his support for

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Spiropolous of Greece supported the language "reasonable interference." *Id.* at 103 (200th mtg.). Yepes of Columbia supported "unnecessary" interference. *Id.* at 104 (201st mtg.). Scelle of France supported "sensiblement." *Id.* at 109 (201st mtg.). Sandstrom of Sweden waivered between "unreasonable," *id.* at 103 (200th mtg.) and "substantial" interference, *id.* at 104 (201st mtg.).

199. The change from "unreasonable" to "unjustifiable" was adopted 11 to 0, with 2 abstentions. *Id.* at 110. Article 6, containing Pal's language, was then adopted unanimously, *id.* at 113 (202d mtg.), subject to later resolution of the question whether Article 6(1) should refer to "mineral" or "natural" resources. This was finally resolved in favor of "natural" resources at the 205th meeting. *Id.* at 135.

200. *Id.* at 102 (200th mtg.).

201. *Id.*

202. Report of the International Law Commission to the General Assembly, 8 U.N. GAOR, Supp. (No. 9) at 13, para. 77 of commentary, U.N. Doc. A/2456 (1953), *reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 200, 215, U.N. Doc. A/CN.4/SER.A/1953/Add. 1 (1959).

203. Summary Records of the 200th Meeting, [1953] 1 Y.B. INT'L L. COMM'N 102, U.N. Doc. A/CN.4/SER.A/1953 (1959).

204. *Id.* at 102 (200th mtg.). Report of the International Law Commission to the General Assembly, 8 U.N. GAOR, Supp. (No. 9) Annex II, 45-46, U.N. Doc. A/2456 (1953), *reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 200, 245-46, U.N. Doc. A/CN.4/SER.A/1953 (1959).

205. *Id.*

206. *See supra* notes 184-88 and accompanying text.

Francois' position.[207] Mr. Sandstrom, of Sweden, did not fully agree, but, in apparent recognition of the balancing standard articulated in Article 5, would go no further than to say that if the coastal state wished to exploit an area where cables were already laid, it must bear the cost of relocation.[208] The commentary relevant to Article 5 of the 1953 draft[209] supports Francois' conclusion that a balancing approach was intended. It states that the standard in Article 5 was "designed to prevent either *arbitrary* prohibition or discrimination against foreign nationals."[210]

1956: The ILC's 1956 provisions which correspond to Articles 5 and 6(1) of the 1953 draft appeared in draft Articles 70 and 71(1). The latter provision continued the "unjustifiable interference"[211] standard regarding navigation and fishing, while the former reaffirmed the "reasonable measures" approach on submarine cables.[212] During the meetings of the eighth session there were no discussions about the nature of the standard reflected in the "unjustifiable interference" language of Article 71(1).[213] The commentary to that provision, however, characterized navigation and fishing as two of the "main manifestations of the freedom of the seas."[214] The Commission's additional statement that "[i]nterference, even if substantial, with navigation and fishing might, in some cases, be justi-

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207. *See* Summary Records of the 201st Meeting, [1953] 1 Y.B. INT'L L. COMM'N 102, U.N. Doc. A/CN.4/SER.A/1953 (1959).

208. *Id.*

209. *See* Report of the International Law Commission to the General Assembly, 8 U.N. GAOR, Supp. (No. 9) at 15, para. 76 of commentary, U.N. Doc. A/2456 (1953), *reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 200, 215, U.N. Doc. A/CN.4/SER.A/1953 (1959).

210. *Id.* This reference to Article 5 being directed at "arbitrary" prohibitions appears in the commentary while the language of the article itself suggests flatly that the coastal state "may not prevent the establishment or maintenance of submarine cables." Report of the International Law Commission to the General Assembly, 8 U.N. GAOR, Supp. (No. 9) at 15, U.N. Doc. A/2456, art. 5, para. 76 of commentary, *reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 200, 215, U.N. Doc. A/CN.4/SER.A/1953 (1959). Reading the language of the article as even preventing non-arbitrary prohibitions, however, would fail to give full meaning to the balancing test and the commentary's reference to the fact that the "may not prevent" language was focused on "arbitrary" prohibitions.

211. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) at 11, art. 71(1), U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 264, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957).

212. *Id.* at art. 70.

213. Summary Records of the 360th Meeting, [1956] 1 Y.B. INT'L L. COMM'N 149, 150-51, U.N. Doc. A/CN.4/SER.A/1956 (1956).

214. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) at 45, commentary 1, art. 71, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 299, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957).

fied,"[215] signifies that the commentary did nothing more than recognize frequency of use.

As with Article 71(1), there was little explanatory discussion concerning Article 70. What was reported, though, indicates that the Commission agreed to take language found in the commentary to Article 34(2) of the 1955 draft dealing with the high seas[216] and reproduce it in the commentary to Article 70 of the 1956 draft convention.[217] The end result was to describe the "reasonable measures" test of Article 70 as providing that "[t]he coastal state is *required* to permit the laying of cables" but that it may establish conditions concerning routes which the cables must follow.[218] As a point of comparison, the commentary to the 1953 draft of Article 5 described "reasonable measures" as prohibiting "*arbitrary* prohibition or discrimination."[219] The differences in wording might give one the impression that the 1956 commentary rejects a true balancing approach. Since it required the coastal state to permit the laying of cables, in a hypothetical situation involving active exploitation of the entire shelf, the right to lay cables would apparently prevail.

Two reasons exist for suggesting that this view should not be accepted. First, given the improbability that active exploitation would occur everywhere on a coastal state's entire continental shelf at the same time, the Commission was likely thinking only of situations involving exploitation of less than the entire shelf when it adopted the commentary to Article 70. With this as an operative assumption, the language of the commentary could be construed literally while giving the "reasonable measures"

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215. *Id.*

216. Article 34(2) of the 1955 draft states: "Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables." Report of the International Law Commission to the General Assembly, 10 U.N. GAOR, Supp. (No. 9) at 13, art. 34(2), U.N. Doc. A/2934, *reprinted in* [1955] 2 Y.B. INT'L L. COMM'N 19, 32, U.N. Doc. A/CN.4/SER.A/1955/Add.1 (1960). The second sentence of paragraph 3 of the commentary following Article 34(2) states: "Paragraph 2 [of Article 34] was added to make it quite clear that the coastal State is obliged to permit the laying of cables and pipelines on the floor of its continental shelf but that it can impose conditions as to the track to be followed . . . ." *Id.* (commentary).

217. Summary Records of the 360th Meeting, [1956] 1 Y.B. INT'L L. COMM'N 149, 150, U.N. Doc. A/CN.4/SER.A/1956 (1956).

218. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) at 45, 46, commentary 1, art. 70, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 298-99, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957) (emphasis added).

219. *See* Report of the International Law Commission to the General Assembly, 8 U.N. GAOR, Supp. (No. 9) at 15, U.N. Doc. A/2456 (1953), *reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 200, 215, U.N. Doc. A/CN.4/SER.A/1953 (1959) (emphasis added).

approach enunciated in the Article itself full meaning as a true balancing approach. Specifically, if less than the entire shelf were being exploited, the coastal state would be required to permit the laying of cables in unexploited areas along routes which it would establish. If the entire shelf were under active exploitation, that obligation would not obtain. The reasonableness of not giving the obligation full effect would depend upon an assessment of the various competing interests involved. Second, the records of the 1955 session containing the debates on Article 34(2)[220] implicitly suggest that the delegates did not view the provision as requiring the coastal state to permit the laying of cables in an instance where the entire shelf was actively under exploitation.

During the debate at the 1955 session, Mr. Spiropoulos referred approvingly[221] and Mr. Scelle referred disapprovingly[222] to the fact that Article 34(2) contemplated cables being subject to "diversions" imposed by the coastal state. Since a diversion would be possible only when some portion of the shelf remained to which it could be applied, these references evoke the question of whether the obligation to permit the laying of cables obtains whenever the entire shelf is actively under exploitation. Throughout the discussion, Scelle expressed his consternation with what he perceived as the subordination of the freedom to lay cables to the right of the coastal state to exploit the shelf.[223] The other delegates failed to express this concern, thus suggesting that under the "reasonable measure[s]" test, the scale does not invariably tip in one direction.[224]

1958: On the language of Articles 4 and 5(1) of the 1958 Shelf Convention quoted at the beginning of this section, it is apparent the delegates to UNCLOS I chose to preserve the "unjustifiable interference" and "reasonable measures" tests reported by the ILC in 1956. Some criticized the "unjustifiable interference" standard as too vague;[225] and others favored alternative language designed to restore the hierarchical approach the ILC had advocated in 1951 and 1953.[226] In the end, "unjustifiable interference" was retained by a vote in the Fourth Committee of 35-0, with 13 abstentions[227] and in Plenary of 50-0, with 14

220. *See* Summary Records of the 285th and 286th Meetings, [1955] 1 Y.B. INT'L L. COMM'N 14, 18-19, 19-22, U.N. Doc. A/CN.4/SER.A/1955 (1960).

221. *Id.* at 18.

222. *Id.*

223. *Id.*

224. *See supra* text accompanying notes 184-89.

225. *See* 6 UNCLOS I, Off. Rec., *supra* note 60, at 9, 28, U.N. Doc. A/Conf.13/C.4/SR.7 & SR.12 (1958).

226. *Id.* at 7 (6th mtg.), 84 (29th mtg.).

227. *Id.* at 91 (30th mtg.).

abstentions.[228] In explanation of the favorable vote in Committee, Ms. Whiteman, of the United States, said the language referred to "a balance between . . . navigation and exploitation"[229] and Mr. Jhirad, of India, suggested it called for "a comparative assessment of [the] different interests . . . involved."[230]

On "reasonable measures" a similar result obtained; the vote in Committee was 48-0, with 8 abstentions[231] and in Plenary was 45-0, with 2 abstentions.[232] Though no reference was made by any of the delegates to the confusing language appearing in the commentary to the 1956 draft of Article 70,[233] Ms. Whiteman did say that "[s]ince it was impossible to foresee all the situations that might arise . . . no more definite criterion than that of reasonableness could be established."[234] This statement sounds strikingly like the response of Francois to the comment of the Danish government on the 1951 draft of Article 5. Furthermore, given the reference to the impossibility of foreseeing "all the situations that might arise," Ms. Whiteman's statement suggests that "reasonable measures" has meaning, in fact, even when the situation involves coastal state action in contravention of the requirement to permit the laying of cables and pipelines in order to insure that its efforts of active exploitation of the entire shelf are implemented.

(b) Interfering Foreign State Military Use Unlawful: Hierarchical or Balancing Approach?

It is clear from what has been said that Articles 4 and 5(1) do not establish a hierarchical approach to resolving conflicts between foreign state military use of the continental shelf and coastal state resource-related activity. Further, it would seem that the approach which the provisions establish does not apply to foreign state military undertakings not strictly within "navigation," "cables," and "pipelines" as those terms are commonly understood. As we have seen,[235] the evidence strongly suggests that

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228. 2 UNCLOS I, Off. Rec., *supra* note 60, at 15, U.N. Doc. A/Conf.13/SR.9 (1958).

229. *See* 6 UNCLOS I, Off. Rec., *supra* note 60, at 88, U.N. Doc. A/Conf.13/C.4/SR.30 (1958).

230. *Id.* at 12 (8th mtg.).

231. *Id.* at 80 (27th mtg.).

232. 2 UNCLOS I, Off. Rec., *supra* note 60, at 15, U.N. Doc. A/Conf.13/SR.9 (1958).

233. 6 UNCLOS I, Off. Rec., *supra* note 60, at 78-80, U.N. Doc. A/Conf.13/C.4/SR.27 (1958).

234. *Id.* at 79.

235. *See supra* notes 150-73 and accompanying text.

military uses not within those terms may not be assimilated thereto. The question which quite naturally arises, then, is what standard does apply?

In attempting to provide an answer to this question, it must be recognized that the discussion so far has focused only on the matter of foreign state military use conflicting with coastal state resource-related activity. The reality, however, is that there are two quite distinct coastal state activities with which the foreign state military use might conflict: (1) those involving military use of the continental shelf undertaken by the coastal state itself;[236] and (2) those involving coastal state efforts to explore and exploit the natural resources of the continental shelf.

The first, which involves foreign state military use of the continental shelf conflicting with similar activity undertaken by the coastal state itself, falls within the terms of the second paragraph of Article 2 of the High Seas Convention.[237] Specifically, since the uses undertaken by the concerned states find support in the freedom of the high seas, conflicts between these uses must be resolved by the balancing test reflected in the obligation to exercise the freedom with "reasonable regard" for the interests of other states in their exercise of the freedom of the high seas.

The second, which involves a conflict with coastal state resource-related activity, is much more troubling. Given that the coastal state activity is grounded in the grant of "sovereign rights" contained in the Shelf Convention, the conflict is not between two *high seas freedoms* and, therefore, is not one subject to the "reasonable regard" standard of Article 2 of the High Seas Convention. The two remaining possibilities for resolving a conflict of this nature include a hierarchical approach, providing that resource-related activities of the coastal state prevail if foreign state military uses create any interference therewith, and a balancing approach, based on an assessment of the nature and value of the competing uses involved.

The hierarchical approach favoring the coastal state has definite support in the *travaux* and the language of the 1958 Shelf Convention. The records of the meetings of the Fourth Committee at UNCLOS I clearly indicate that Mr. Munch, of the F.R.G., expressed his preference for the hierarchical approach during the deliberations on the Bulgarian and

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236. On the right of a coastal state to use its own shelf for military purposes, see *supra* note 21.

237. Article 2 states, in relevant part, that "[t]hese freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." 1958 High Seas Convention, *supra* note 14, at art. 2, 13 U.S.T. at 2314, 450 U.N.T.S. at 84. *See infra* note 239 & 360.

Indian proposals to prohibit the building of military bases or installations.[238] As will be recalled, he observed that foreign states could use another state's continental shelf for military purposes as long as the use did not interfere with the "sovereign rights" of the coastal state to explore the shelf and exploit its natural resources.[239] Munch's observation was neither objected to nor contradicted by any representative. Other representatives who spoke on the proposals did not advance any suggestion which usefully could be applied to the resolution of conflicts between military and resource-related undertakings.

The most compelling piece of evidence supporting the simple interference standard, however, is the very absence from Articles 4 and 5(1) of the Shelf Convention of any reference, direct or indirect, by name or through the use of some general term such as "*inter alia*," to military use not strictly within the terms "navigation," "cables," or "pipelines."[240] The logical inference is that the balancing test set forth in those provisions was not applicable to resolve conflicts between military uses of such a nature and resource-related undertakings of the coastal state. It seems the language of Articles 4 and 5(1) would have made some reference to military uses of those sorts if the drafters had intended this provision to apply to those conflicts.

As attractive as the hierarchical approach favoring the coastal state appears, there would seem to be two reasons for rejecting it and preferring a balancing approach which resolves conflicts between foreign state military use and coastal state resource-related activity on the basis of an assessment of the nature and value of the competing uses involved. First, the hierarchical approach has rarely been used in the international law process. With only a few known exceptions, the balancing test reflected in the reasonableness standard is the approach which has typically been used to resolve conflicts between competing permissible uses.[241] Second, application of the interference approach would result in foreign state uses that are not within "navigation," "cables," or "pipelines" automatically giving way to the resource-related rights of the coastal state in instances of conflict. The balancing test, on the other hand, which acknowledges the

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238. *See supra* note 120 and accompanying text.

239. *See* Brown, *The Legal Regime of Inner Space*, 22 CURRENT LEGAL PROBS. 181, 186 (1969); Zedalis, *supra* note 16, at 647; Zedalis, *Military Installations, Structures, and Devices on the Continental Shelf: A Response*, 75 AM. J. INT'L L. 926, 929 (1981).

240. 1958 Continental Shelf Convention, *supra* note 14, at arts. 4, 5, para. 1, 15 U.S.T. at 472, 499 U.N.T.S. at 314.

241. *See* M. MCDOUGAL & W. BURKE, *supra* note 17, at 37-38, 56-58, 579, 758-63; Fisheries Case, [1951] I.C.J. 116-43; Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 407-09 (1950).

changing nature of international conditions, would avoid the capriciousness of such a result.

The time-honored status of the balancing approach, however, is not alone sufficient to dictate its continued use. It should be noted, however, that the result produced by application of hierarchical approach would be especially disturbing. One may be content to see resource-related rights of the coastal state preferred over foreign state military uses. But if this preference results from the application of a simple interference test, one may have to accept coastal state resource-related activity being preferred over a military use even when the importance of the latter is supported by the most compelling reasons of security. Similarly, the coastal state's resource-related activity may have to be preferred over a foreign state nonmilitary use which not only avoids infringing the coastal state's "sovereign rights" but also generates, in comparison to the resource-related activity of the coastal state, extremely valuable benefits which inure indirectly to many members of the world community. These results would seem undesirable and not in keeping with other provisions of the Shelf Convention. Article 5(6),[242] for example, provides that in some instances the value of a foreign state use may outweigh that undertaken by a coastal state. In an effort to avoid problems of this sort, reliance on the customarily recognized balancing test would seem desirable.

The foreign state military uses of the continental shelf which might conflict with coastal state military or resource-related activities include the conduct of ongoing military maneuvers, the emplacement of weapons, and the deployment of seabed-based detection devices. In assessing the lawfulness of these military uses in relation to coastal state military or resource-related activity, the balancing test would require consideration of the following:

* Whether the foreign state military use is in fact designed to obtain a military advantage or simply designed to restore military parity;
* If the coastal state activity with which the foreign state military use conflicts is itself of a military nature, whether it is in fact designed to obtain a military advantage or to restore military parity;
* Whether the foreign state military use manifests itself in an active or in a passive manner;
* The extent to which the foreign state military use relies on objects affixed to the shelf or results in long-term utilization of the shelf;

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242. 1958 Continental Shelf Convention, *supra* note 14, at art. 5, para. 6, 15 U.S.T. at 474, 499 U.N.T.S. at 316 ("Neither the installations or devices [for coastal state exploration], nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.").

* In cases where the coastal state activity with which the foreign state use conflicts involves exploration for and exploitation of the shelf's natural resources, whether that resource-related activity produces benefits exclusively for the coastal state or other states as well;
* The relative needs of the states involved for the benefits produced by the conflicting uses;
* The extent to which the foreign state military use jeopardizes coastal state security;
* The extent to which the foreign state military use meets legitimate security needs of the foreign state;
* Possibilities for accommodation of the conflicting uses and the various costs associated with such accommodation;
* Likelihood that the foreign state military use would be equally effective if conducted from a location beyond the continental shelf of the coastal state;
* The extent to which the foreign state military use involved promotes international stability or serves to cause international instability.

Examined in light of the foregoing factors, it would seem that foreign state military use could conceivably prevail over coastal state military or resource-related activity whenever the use is in fact designed to restore military parity, arises from unquestionable security needs, and serves to buttress international stability.[243] When a foreign state engages in maneuvers or uses weapons or detection devices to obtain a military advantage[244] and the maneuvers, weapons, or devices interfere with coastal state resource-related activity, the foreign state not only impedes or prevents the distribution of wealth to the coastal state, and perhaps to others, but it also jeopardizes coastal state security, thereby increasing the chances of international instability. The general desire to avoid the risks associated with international instability seems to be sufficiently compelling to warrant characterizing military undertakings of a foreign state designed to produce a military advantage as unlawful, even though the resource-related activity with which such undertakings interfere may inure to the benefit of the coastal state alone. Instability increases the chances that a disadvantaged state will take precipitous action in dealing with those which threaten it and often confronts an advantaged state with the temptation to capitalize on its new-found favorable position.

In the case of a conflict with military activity conducted by the coastal state itself, the determination of unlawfulness is admittedly more difficult to reach but is, nevertheless, inescapable. Basically, the coastal state

243. *See infra* notes 244-51 and accompanying text.

244. While one may generally view detection devices as lacking offensive capacity, when they are integrated with a larger military network they can acquire offensive capacity.

military activity with which the foreign state use interferes may either be designed to produce an advantage or to restore parity. If designed to restore parity, it should always prevail over a foreign state use designed to produce military advantage.[245] If the coastal state military activity is designed to obtain a military advantage, the answer is less certain. It would be a mistake, however, to conclude that any result of an application of the balancing test which permits the offensive military use of one of the two states to prevail over that of the other state would necessarily jeopardize the other state's security and thereby imperil international stability. Upon close scrutiny, the military use of one state may indeed sufficiently buttress international stability to warrant its prevailing over the competing use of the other.

Coastal state security is of the utmost importance. It is clear, therefore, that use of the balancing test need not await an actual conflict between foreign state military use and coastal state military or resource-related activity to work its juridical determination. Since a threat to coastal state security sufficient to imperil the stability of the international community may flow from foreign state use designed to produce a military advantage (even in a situation where the coastal state is not conducting activity with which such use may conflict) the balancing test would seem to apply at the stage when the foreign state first reflects on possible military use.[246] It has been observed by eminent authority that a balancing test which calls for consideration of the coastal state's interest in security prohibits the very initiation of most foreign state military uses of another state's continental shelf.[247]

The prudence of this position lies in two distinct, yet somewhat related, rationales. First, to maintain otherwise and thus permit a coastal state to be subjected to a foreign state military use designed to produce a military advantage could threaten the very balance of power which the

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245. The reason for this is quite simple. The coastal state activity enhances international stability by protecting the coastal state against threats to its security, while the foreign state use disrupts stability by placing the coastal state in military jeopardy.

246. As is the case with all principles of international law, the balancing test will initially be applied by the state interested in a particular use. Since its judgment is open to reconsideration by other members of the international community, an inaccurate assessment of how the scales tip is open to scrutiny, condemnation, and retaliatory reaction.

247. *See* M. MCDOUGAL & W. BURKE, *supra* note 17, at 719 & 724. McDougal and Burke, however, do not note that the balancing test they apply derives only from customary principles of law and not from the express provisions of either the Shelf Convention or the High Seas Convention. Both Conventions contained balancing tests, but they do not apply to conflicts involving foreign state military uses and coastal state resource-related activities or security interests. *See supra* text accompanying notes 235-51.

international legal order is designed to support.[248] Military maneuvers involving use of the continental shelf by foreign state equipment and personnel, and the affixation to the shelf of destructive foreign state weaponry, could be directed at the seagoing military forces of the coastal state. Normally, one would not consider sensitive detection devices emplaced on the continental shelf as falling in the same category. But, if the devices are integrated with a larger military network able to utilize the information produced for the purpose of assisting in the neutralization of detected coastal state naval vessels, there would be no reason for not considering the threat posed by them to be of an equivalent character. In giving full effect to the balancing test, it must be found that the very initiation of any of these military uses by a foreign state in order to obtain an advantage against the coastal state violates international law.

Second, a coastal state should not be expected to tolerate a foreign state military use which threatens to place it at a disadvantage. The coastal state will undoubtedly take responsive action that might precipitate a serious international dispute. In this context, one must recall the problems associated with the enforcement of any principle of international law. To a large extent these suggest that the most time honored and respected principles are those which simply mirror the practices or actions in which states would otherwise normally engage. If international law is to be taken seriously, this fact should be kept firmly in mind. Rather than arguing that the customarily-used balancing test enjoined by international law does not deal with the question of foreign state military use until it is undertaken and actually conflicts with a coastal state activity, it would seem best to argue that it governs such use from its very initiation to its interference with military or resource-related activity of the coastal state. This brings law and practice into harmony.[249]

One might question the view that international law of the sea prohibits the very initiation of foreign state military maneuvers, the emplacement of weapons, and the deployment of detection devices when a state undertakes these activities in order to obtain a military advantage, given that the negotiating history of the Shelf Convention itself indicates in no uncertain terms that it is lawful for foreign state submarines to come to rest on another state's continental shelf.[250] How, one might ask, can uses which

248. *See generally* Vagts & Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AM. J. INT'L L. 555 (1979).

249. *Accord* M. MCDOUGAL & W. BURKE, *supra* note 17, at 724 (concluding initiation of foreign state military use is prohibited, authors mention importance of fact that coastal state will not tolerate such activity.).

250. *See supra* notes 105-13 and accompanying text.

jeopardize coastal state security only indirectly and distant in time be prohibited while a use which jeopardizes security directly and immediately be permitted?

It is completely consistent to argue that the balancing test prohibits military maneuvers, the emplacement of weapons, and the deployment of detection devices when these are designed to give the foreign state a military advantage and yet defend the lawfulness of foreign state submarines coming to rest on another state's continental shelf. The ballistic missile launching submarine has long been recognized as the most stabilizing component of the nuclear triad. This is both because the inaccuracy of the SLBMs it carries prevents their use for preemptive strikes and because the relative invulnerability of the submarine itself does not make it an easy target for those tempted to launch a preemptive strike.[251] Therefore, advocating the position that the balancing test prohibits maneuvers, weapons, and detection devices designed to threaten the SSBN serves to buttress international stability and coastal state security by assuring that the SSBN will be allowed to continue performing its role in deterring nuclear conflict. To argue, on the other hand, that the lawfulness of foreign state SSBNs coming to rest suggests the lawfulness of military uses which threaten SSBNs serves only to promote international instability. There can be no doubt that the balancing test is specifically intended to avoid this result.

(c) Remedial Action

If a foreign state applying the balancing test[252] faces a result suggesting the unlawfulness of a contemplated use, and, nevertheless, initiates the use or persists in the use, the coastal state might wish to take remedial action. In those situations where the foreign state use amounts to the kind of violation of the U.N. Charter warranting the invocation of Article 51,[253] the coastal state may resort to unilateral force directed at termination of ongoing activity or removal of objects (i.e., weapons or detection devices) emplaced as a result of earlier activity. If no such violation of the Charter exists, military objects left unprotected by forces of the foreign state would seem lawfully subject to removal efforts by the coastal state because such efforts would not necessitate resort to force

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251. *See* Scoville, *Missile Submarines and National Security*, SCIENTIFIC AM., June 1972, at 16-17.

252. *See supra* notes 241-51 and accompanying text.

253. U.N. CHARTER art. 51.

violative of Article 2(4).[254] Further, it would seem to matter little whether a representation of violation has been advanced by the coastal state and rejected by the foreign state. The obligatory peaceful settlement procedures established by Chapter VI of the U.N. Charter[255] would not be triggered in either case. The simple explanation is that, even in cases where the coastal state has made a representation which the foreign state has rejected, the "dispute" which exists[256] is not one likely to endanger the maintenance of international peace and security.[257] This is because the objects which precipitated the dispute can quickly be made inoperative and removed without foreign state resistance.[258]

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254. *Id.* art. 2, para. 4.

255. *Id.* arts. 33-38. The touchstone of the obligation spelled out in Chapter VI appears in Article 2(3) of the Charter. *Id.* art. 2, para. 3. Elaborating on this, Chapter VI contains two general categories of settlement efforts: those between the parties themselves, *id.* art. 33, and those taken by the Security Council, *id.* arts. 34, 35, 37. The former is obligatory whenever a dispute is "likely to endanger the maintenance of international peace and security." *Id.* art. 33, para. 1. The latter is also obligatory — but on the part of the parties to refer the dispute to the Security Council and the Security Council to take it — where settlement efforts under Article 33 prove elusive. *Id.* art. 37, para. 1. Articles 34 and 35, however, establish a discretionary power of consideration. They entitle the Security Council on its own initiative, or as a result of action by any state, to commence an inquiry into "any dispute" or "any situation which might lead to international friction." *Id.* arts. 34, 35. The objective, of course, would be to determine if the dispute or situation is "likely to endanger the maintenance of international peace and security." Irrespective of the category of settlement efforts used, the Security Council is empowered by Articles 33(2), 36, and 37(2) to "call upon the parties to settle their dispute" by means listed in Article 33(1), *id.* at 33, para. 2, or issue recommended "procedures or methods of adjustment," *id.* art. 36, para. 1, or "terms of settlement," *id.* art. 37, para. 2, only when international peace and security is likely to be endangered, *id.* art. 37, para. 2.

256. The "dispute" may concern an interpretation of admittedly applicable legal principles or whether the factual situation is as claimed. *See generally* Liang, *The Settlement of Disputes in the Security Council: The Yalta Voting Formula*, 24 BRIT. Y.B. INT'L L. 330 (1947).

257. Concededly, the Security Council may, if it becomes aware of the "dispute," initiate an inquiry under Articles 34 or 35(1). U.N. CHARTER arts. 34, 35, para. 1. As observed, *supra* note 255, this would simply be the first step in the Security Council attempting to determine whether it is seized of jurisdiction to exercise its powers under Articles 33(2), 36, or 37(2). Since the facts as stated above do not involve a dispute of the nature which would trigger those powers, *see* L. GOODRICH, E. HAMBRO & A. SIMONS, THE CHARTER OF THE UNITED NATIONS 268 (1969) [hereinafter cited as THE CHARTER OF THE UNITED NATIONS], the matter will end at that step.

258. What makes this conclusion especially compelling is the fact that it seems to comport with reality, a goal to which any interpretation of an international legal principle should aspire. One might argue that the very emplacement of military objects on another state's continental shelf is "likely to endanger the maintenance of international peace and security," U.N. CHARTER art. 33, para. 1, and that an awareness of the emplacement on the part of the coastal state creates a "dispute" the moment the coastal state develops an interest in removal to which the foreign state is not likely to consent. But this does not lead to a very palatable, or very probable, conclusion. Once the dispute is joined, Article 33 of the

In those instances when the coastal state lacks the wherewithal to embark on a removal effort, is likely to encounter resistance necessitating the use of force against contingents of the foreign state to effect the removal, is confronted with an assertion by the foreign state maintaining the lawfulness of the military object's emplacement, as well as when the foreign state military undertaking consists of current, ongoing maneuvers involving the presence of foreign state forces and equipment, reference to the peaceful settlement mechanisms of Chapter VI is appropriate.[259] Coastal state inability to undertake a removal effort would most likely lead to a representation of a violation being transmitted to the foreign state. A rejection relating to military objects designed to produce a military advantage for the foreign state, though not warranting invocation of Article 51, gives rise to a dispute "likely to endanger the maintenance of international peace and security."[260] As recounted earlier,[261] the threat to

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Charter obligates the states involved to peacefully resolve the matter. *Id.* art. 33. If such efforts prove fruitless, then Article 37 requires referral to the Security Council. *Id.* art. 37. The Security Council, however, is only empowered to issue non-binding recommendations which the foreign state may ignore. *Id.* art. 37, para. 2. It is possible that the Security Council may then determine that the situation constitutes a "threat to the peace" under Article 39 of Chapter VII and decide upon action under Article 41 or military measures under Article 42. *See id.* arts. 39, 41, 42. The possibility, of course, would never materialize if the emplacing state happened also to be a permanent member of the Council. *See infra* note 417. Thus, the most the coastal state could expect would be Security Council action designed to effectuate removal. During the interim, however, the military objects would remain in place and would be capable of accomplishing their operational objectives. Since the chances are rather remote that military decisionmakers would find this acceptable, legal proscriptions leading to this type of conclusion would be honored more in the breach than in the observance.

Admittedly, the suggestion that mechanisms set forth in Chapters VI and VII of the Charter must be exhausted before any unilateral effort is undertaken has advantages. This suggestion would subject the coastal state's assessment of foreign state inability to meet the rigors of the balancing test to independent scrutiny. Few determinations under international law, though, are so made. Additionally, foreign states are not totally without power to compel such an assessment. The foreign state is entitled to have that assessment considered at any time it suspects that the coastal state is interested in removal. *See infra* text accompanying notes 259-69. In conclusion, it may indeed be argued that all of this will simply encourage the foreign state to station forces in the vicinity of military objects which they have emplaced. This result would lead the coastal state to undertake covert removal efforts. Though seemingly logical, it is highly unlikely that a foreign state would be willing to risk disclosure of the fact of emplacement in order to trigger the dispute resolution mechanisms of the Charter, since disclosure could result in neutralizing countermeasures. Similarly, covert removal is the most likely route the coastal state is to pursue, and principles designed to compel discussion thus would be flouted. The result could well be a diminished respect for other legal principles.

259. *See supra* notes 260-69 and accompanying text.

260. U.N. CHARTER art. 33, para. 1.

261. *See supra* notes 244-45 and accompanying text.

the coastal state increases the chances that the foreign state will be faced with the temptation to capitalize on its new-found favorable position, while the disadvantaged coastal state will be placed in a position of perhaps acting precipitously in future dealings with those that threaten it. The foreign state may question this and refuse to submit to the procedures of Article 33(1)[262] but if the coastal state presents the relevant facts to the Security Council under Article 35(1), it can enlist the Council's assistance in giving effect to the obligation to peacefully settle the dispute.[263]

A rejection of a coastal state representation concerning foreign state military objects which fails to survive the rigors of the balancing test because of a conflict with coastal state military or resource-related activity would, on the other hand, be much more troublesome. Though the objects may pose some demonstrable threat to the coastal state, if it is not significant enough to create a military advantage likely to jeopardize the security of the states involved, one might be inclined to view the dispute as not of a nature to trigger the foreign state's obligation to submit to peaceful settlement on its own, under Article 33(1), or upon Security Council urging, under Article 33(2). It is impossible to know whether the foreign state's obligation will be activated, because the coastal state might resort to other measures within its power in retaliation for the emplacement. The same observation applies if the foreign state's military objects have the potential for presenting an ominous threat to the coastal state upon integration with a comprehensive military system at some indeterminate future time.[264] The answer in such situations may, in large measure, depend upon the Security Council's receptiveness to viewing the dispute as "likely to endanger" international peace and security, thus prompting it to call upon the parties to meet their peaceful settlement obligation.[265]

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262. U.N. CHARTER art. 33, para. 1.

263. If the Security Council determines that the dispute is "likely to endanger the maintenance of international peace and security, it is obligated to 'call upon the parties' " to observe their duty under Article 33(1). *See* THE CHARTER OF THE UNITED NATIONS, *supra* note 257, at 263.

264. The reasons for reading Chapter VI as not requiring the coastal state to seek removal through dispute settlement procedures when direct efforts would not encounter foreign state resistance, *see supra* note 258 and accompanying text, do not apply in this situation or mean that there is no dispute "likely to endanger the maintenance of international peace and security," U.N. CHARTER art. 33, para. 1. The earlier situation involved the issue of whether the *coastal state* was obligated to seek removal through Chapter VI. The instant situation involves the issue of whether the *foreign state* must submit to settlement procedures under Chapter VI.

265. *See* THE CHARTER OF THE UNITED NATIONS, *supra* note 257, at 268 (in practice, Council has not been limited by the technical requirement that it determine dispute of that nature exists).

Coastal state removal efforts which might encounter foreign state resistance, and efforts to terminate current ongoing maneuvers involving foreign state forces, fall squarely within the language of Article 33.[266] A situation involving an assertion by the foreign state that emplacement efforts undertaken earlier satisfied the balancing test will undoubtedly be received with skepticism. Yet, just as a coastal state lacking the ability to remove military objects may bring the matter before the Security Council under Article 35(1), so too may the foreign state proceed.[267] If it can satisfy the Security Council that its assertion is indeed correct, then under Article 33(2) the foreign state can obtain the Council's help in giving effect to the coastal state's obligation to resolve the matter.[268] Since few foreign state military uses will be able to satisfy the balancing test, it is difficult to envision the Council acting under Article 33(2) very often.[269]

C. 1982 United Nations Convention on the Law of the Sea: Law of the Future

On April 30, 1982, the new United Nations Convention on the Law of the Sea was adopted and declared open for signature beginning the 10th of December.[270] To date it has been signed by 130 nations, including the Soviet Union.[271] While the United States approves of most of the Convention's provisions, its objection to those on deep seabed mining has led it to withhold formal ratification.[272] This means that, with the exception of those provisions of the Convention reflecting principles received into the corpus of customary international law,[273] resort must be had to the standards prescribed by the 1958 regime in order to determine whether military use of another state's continental shelf by the United States, or foreign state use of the United States' continental shelf, is consonant with

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266. U.N. CHARTER art. 33, para. 1.

267. U.N. CHARTER art. 35, para. 1.

268. *Id.* at 33, para. 2. This would seem to follow from two facts. First, the balancing test is passed only when the emplacement of military objects is to restore military parity, when it arises from legitimate security needs, and when it serves to buttress international stability. Secondly, removal would therefore undermine that stability, endangering the maintenance of international peace and security.

269. For a discussion of military uses and the balancing test, *see supra* notes 235-51.

270. *See* Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, 60 FOREIGN AFF. 1006, 1021 (1982).

271. As of September 1983, the Bahamas, Fiji, Ghana, Jamaica, Mexico, Zambia, and the U.N. Council for Nambia had ratified the Convention through internal constitutional processes. The Convention requires sixty ratifications before it will take effect.

272. Oxman, *The New Law of the Sea*, 69 A.B.A. J. 156 (1983).

273. The principles of the exclusive economic zone are often so viewed. *See Continental Shelf Case* (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 4, 74.

international law. Yet, two facts lead to the conclusion that the 1982 Convention should be addressed. First, states other than the United States and the Soviet Union have the technological sophistication to use another state's shelf for military purposes and, second, the United States may sufficiently change its attitude and sign and ratify the Convention. In view of these facts, it would seem terribly remiss to confine discussion to the 1958 Geneva regime.

The provisions of the 1982 Convention which affect foreign state military use of another state's continental shelf are found in three separate portions of the Convention: Part V, "Exclusive Economic Zone" (EEZ); Part VI, "Continental Shelf;" and Part VII, "High Seas." Traditionally, that part of the seabed forming the natural prolongation of a coastal state's territorial landmass has been subject to the legal regime of the continental shelf.[274] Under Part VI of the 1982 Convention that principle still applies.[275] Yet, that portion of the shelf within 200 nautical miles of the coastal state's shore-line is regulated by the additional regime of the exclusive economic zone (EEZ).[276] The opening provision of Part V states that the economic zone is "subject to the specific legal regime established in this Part."[277] The rights foreign states are entitled to exercise are therefore limited to those provided in Part V.[278] A coastal state may, in addition to exercising the rights set forth in Part V, exercise those rights provided in

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274. *See supra* notes 79-80 and accompanying text.

275. 1982 Convention on Law of the Sea, *supra* note 15, at art. 76, 21 Int'l Legal Materials at 1285. Paragraph 1 of Part VI states:

> The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Id.

276. *Id.* at art. 57, 21 Int'l Legal Materials at 1280. Article 57 states: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." *Id.* Some might contend that the regime of the EEZ applies only to the waters above the shelf. In view of the repeated references in Part V of the Convention to rights of both coastal and foreign states to use the bed and subsoil, however, it is clear that it applies to the bed as well as to the waters.

277. *Id.* at art. 55, 21 Int'l Legal Materials at 1280.

278. For an explanation of the EEZ as developed in the informal composite negotiating text, U.N. Doc. A/Conf. 62/WP.10, *reprinted in* 8 Third United Nations Conference on the Law of the Sea, Official Records 1 [hereinafter cited as UNCLOS III, Off. Rec.], and 16 Int'l Legal Materials 1108 (1977), see Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AM. J. INT'L L. 57, 67-75 (1978). The provisions of the 1982 Convention do not differ in any considerable degree on this matter. *See also* Treves, *supra* note 19, at 831-32.

Part VI, since reference is made to the fact that the rights of coastal states include those set forth in other provisions of the Convention.[279]

A slightly different regime has been applied to that portion of the shelf extending beyond the 200 mile limit of the EEZ. Part VI on the continental shelf and Part VII on the high seas spell out the rights various states are entitled to exercise.[280] The rights of the coastal state basically replicate — with a few changes — those set forth in the 1958 Geneva Convention of the Continental Shelf.[281] Foreign states, however, are treated differently. Part VI diverges from the approach taken in the Shelf Convention by going beyond a mere statement of coastal state rights and also referring to rights foreign states are entitled to exercise.[282] This may be the result of an overabundance of caution. Since the opening provision of Part VII on the high seas makes those same rights plus others applicable to areas beyond the EEZ, the articulation is unnecessary[283] and could very well lead to

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279. 1982 Convention on Law of the Sea, *supra* note 15, at art. 56, para. 1, 21 Int'l Legal Materials at 1280 (in the exclusive zone the coastal state has several enumerated rights and "other rights and duties provided for in this Convention").

280. *See id.* at arts. 76-120, 21 Int'l Legal Materials at 1285-91.

281. *Id.* at art. 77, para. 1, 21 Int'l Legal Materials at 1285. Article 77(1) provides that "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." *Id.* Article 80 makes Article 60, on the EEZ, applicable to the shelf. *Id.* at 1286, art. 80. Article 60 grants the coastal state the exclusive right to "construct and to authorize and regulate the construction, operation and use" of artificial islands and many installations and structures. *Id.* at art. 60, 21 Int'l Legal Materials at 1280-81. Article 81 grants the coastal state the exclusive right concerning drilling for "all purposes." *Id.* at art. 81, 21 Int'l Legal Materials at 1286.

282. *See id.* at art. 79, para. 1, 21 Int'l Legal Materials at 1285. Article 79(1) provides that "*[a]ll* States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article." *Id.* (emphasis added). Article 78(2) also mentions "navigation and other rights and freedoms . . . as provided for in this Convention." *Id.* at art. 78, para. 2, 21 Int'l Legal Materials at 1285. They are mentioned, however, in the context of a limitation on the rights of the coastal state. This suggests that 78(2) should not be read as containing a grant of rights. Further support for this view exists in the fact that Article 79(1) contains a clear grant of authority to lay cables and pipelines, and then follows the grant with another paragraph designed to limit coastal state activities which might impede exercise of the right. *Id.* art. 79, para. 1, 21 Int'l Legal Materials at 1285. Nothing here indicates that foreign states have not been granted the right of "navigation" and "other rights." These arise from Articles 86 and 87 of Part VII, *id.* at arts. 86, 87, 21 Int'l Legal Materials at 1286-87, however, and not from Article 78(2) of Part VI.

283. *Id.* at 1286-87, art. 87, para. 1. Article 87(1) states:

> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
>
> (a) freedom of navigation;
>
> (b) freedom of overflight;
>
> (c) freedom to lay submarine cables and pipelines, subject to Part VI;
>
> (d) freedom to construct artificial islands and other installations permitted

interpretive problems.[284]

Bearing the distinction between the economic zone and the continental shelf in mind, it would appear that whether the Convention envisions foreign state military use turns on the language which creates foreign state rights in the EEZ and the shelf, as well as that used to place limitations on the exercise of rights thus created. Let us now proceed to examine the provisions relating to these matters.

1. The Right of Foreign State Military Use

(a) The EEZ

The right, in principle, of foreign state military use under the 1958 Geneva Conventions is derived from the applicability of Article 2 of the High Seas Convention to the continental shelf adjacent to any coastal

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under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.

By the terms of Article 86, *id.* at art. 86, 21 Int'l Legal Materials at 1286, these rights are made applicable to "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State . . . ." As under Article 2 of the 1958 High Seas Convention, *supra* note 14, at art. 2, 13 U.S.T. at 2314, 450 U.N.T.S. at 82-84, one could argue that "all parts of the sea" includes that portion of the bed of the high seas designated as the continental shelf of the coastal state.

284. The two most apparent interpretive problems concern whether any state may exercise rights on the shelf beyond those granted in Part VI, and whether any such rights may be exercised by the coastal state. The former problem arises as a consequence of the language of Article 79(1) which purports to grant to all states the right to lay submarine cables and pipelines. *See supra* note 282. This could give rise to the contention that the rights referred to in Article 87 of Part VII do not apply to the shelf. The rights applicable to the shelf would be those set forth in Part VI. The reference in Article 78(2) to "navigation" and "other rights and freedoms . . . as provided for in this Convention," 1982 Convention on the Law of the Sea, *supra* note 15, at art. 78, para. 2, 21 Int'l Legal Materials at 1285, would not affect the cogency of this contention since that language is not designed to grant rights. *See supra* note 282. The latter problem, arises from the fact that the above-mentioned language of 78(2) characterizes those "navigation" and "other rights" as rights exercisable by "other States." 1982 Convention on the Law of the Sea, *supra* note 15, at art. 78, para. 2, 21 Int'l Legal Materials at 1285. This may lead some to suggest that while foreign states may navigate above the shelf, lay cables and pipelines, and engage in other activities on the shelf that are authorized by Article 87, the coastal state may only undertake resource activities and the laying of submarine cables and pipelines. It would seem that both problems are best dealt with by recognizing that it is Part VII on the high seas which grants coastal and foreign states all non-resource rights. When this is done, the failure of Part VI to grant rights other than those pertaining to resources and the laying of submarine cables and pipelines is seen as meaningless. Similarly, the reference to "other States" in Article 79 is not read as suggesting that "other rights" are exercisable only by foreign states. For a discussion of the negotiating history relating to Article 78(2)'s adoption, see *infra* note 360.

state.[285] Under the 1982 Convention that portion of the shelf within 200 nautical miles of the shore-line of a coastal state is subject to the specific legal regime of Part V dealing with the EEZ.[286] Part V provides that within that zone the coastal state possesses, among other things, sovereign rights over the waters, seabed, and subsoil for all economic and resource-related purposes[287] and jurisdiction relating to marine scientific research.[288] Additionally, the coastal state possesses the exclusive right to authorize, construct and regulate artificial islands and various other types of objects,[289] the exclusive right to authorize and regulate drilling for all purposes,[290] and the traditional rights of navigation, overflight, and the laying of submarine cables and pipelines.[291]

The rights of foreign states are not as extensive. They are listed in Article 58(1) of Part V. They include the rights of navigation, overflight, and the laying of submarine cables and pipelines, and "other internationally lawful uses of the seas related to these, such as those associated with the operation of ships, aircraft and submarine cables and pipelines."[292]

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285. *See supra* notes 58-68 and accompanying text.

286. *See supra* notes 276-77 and accompanying text.

287. 1982 Convention on Law of the Sea, *supra* note 15, at art. 56, para. 1, 21 Int'l Legal Materials at 1280. Article 56(1)(a) declares:

> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

Id.

288. *Id.* at art. 56, para. 1(b)(ii), 21 Int'l Legal Materials at 1280.

289. *Id.* at art. 60, para. 1, 21 Int'l Legal Materials at 1280-81. Article 60(1) provides:

> 1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
>
> (a) artificial islands;
>
> (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
>
> (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

Id.

290. *Id.* at art. 56, para. 1(c), 21 Int'l Legal Materials at 1280. Article 56(1)(c) invokes, *inter alia*, Article 81, *id.* art. 81, 21 Int'l Legal Materials at 1286. Article 81 provides that "[t]he coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes." *Id.*

291. *Id.* at art. 58, para. 1, 21 Int'l Legal Materials at 1280. For a more complete listing of coastal state rights, see Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions*, 71 AM. J. OF INT'L L. 247, 261-68 (1977).

292. 1982 Convention on Law of the Sea, *supra* note 15, at art. 58, para. 1, 21 Int'l Legal Materials at 1280.

Since the listing of coastal and foreign state rights does not exhaust all the possible permissible uses of the waters and bed of the EEZ, Article 59 of Part V sets forth a rule of residual competence.[293] In essence, it provides that where the Convention does not attribute rights to either the coastal state or foreign states and a "conflict arises between the interests" of the coastal state and a foreign state, the conflict should be "resolved on the basis of equity, and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."[294] While the primary thrust of this provision is the articulation of a standard for resolving conflicts concerning the conduct of various activities not characterized in Part V as rights, Article 59 also produces another result. Since its enunciated standard applies to undertakings other than those described by Article 56 as rights of the coastal state, or Article 58(1) as rights of all — including foreign — states, it implicitly holds forth the possibility that many other foreign state uses may, in certain cases, take on the characteristics of a right and lawfully be exercised.

Putting aside the matter of assimilating certain types of military uses to navigation, cables, or pipelines,[295] it would appear that foreign state

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293. *Id.* at art. 59, 21 Int'l Legal Materials at 1280.

294. *Id.*

295. The arguments made regarding the 1958 Convention and rejection of the notion of assimilating military activities to navigation, cables and pipelines seem just as applicable here. Article 58(1) states that the rights of navigation and the laying of submarine cables and pipelines are rights "referred to in Article 87." *Id.* at art. 58, para. 1, 21 Int'l Legal Materials at 1280. This signifies that they are *high seas freedoms* which may be exercised in the waters and on the beds of the EEZ. *See* Oxman, *supra* note 278, at 72-73. Since Article 87, *see supra* note 283, like Article 2 of the 1958 High Seas Convention, also refers to "*inter alia,*" it would appear that enumerated freedoms — wherever they are listed — should be understood as having a narrow and common meaning. The official records of UNCLOS III, tend to support this view. Specifically, during the course of the conference the delegate from El Salvador, Mr. Pohl, introduced a proposal, U.N. Doc. A/Conf.62/C.2/L.68, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 235 (1975), which would have made no reference to "*inter alia.*" He explained this omission was designed to advance an exhaustive listing which would avert controversy related to the meaning of the term. 2 UNCLOS III, Off. Rec., *supra* note 278, at 235-36, U.N. Doc. A/Conf.62/C.2/SR.31 (1975). In this context he referred to the controversy which surrounded nuclear weapon tests during the late 1950s and early 1960s. The Salvadoran proposal was not reflected in the informal single negotiating text, *infra* note 299, nor is it reflected in the Convention itself. Had it been adopted, one might be inclined to give the enumerated freedoms of navigation and the laying of submarine cables and pipelines a broad reading. This appears unnecessary since Article 87(1) of the Convention refers to "inter alia," a specific vehicle for supporting freedoms other than those enumerated. The effect, of course, is to ascribe a narrow, common meaning to all enumerated freedoms. For comments suggesting that Article 2 of the 1958 High Seas Convention should simply be transferred to whatever product UNCLOS III settled upon, see 2 UNCLOS III, Off. Rec., *supra* note 278, at 236, 237, U.N. Doc. No. A/

military use of the bed of another state's EEZ is authorized only in two distinct instances. The first would involve a military use considered to be within the reference of Article 58(1) to other uses "related to [navigation, overflight, and the laying of submarine cables and pipelines,] such as those associated with the operation of ships, aircraft and submarine cables and pipelines." The second would involve a military use which the term "interests" in Article 59 is designed to protect.

Arguably one might contend that the words "related to," as contained in Article 58(1), are flexible enough to include foreign state military uses involving the conduct of maneuvers or the emplacement of weapons and detection devices which might be similar, though not identical, in character, configuration, or appearance to navigation, cables, or pipelines.[296] After all, the reference to activities "associated with the operation of ships, aircraft and submarine cables and pipelines" which follows "related to" is prefaced by the words "such as those." These words signify that the listing is illustrative and apparently susceptible to expansion.

It would seem difficult to dispute the contention that the prefatory words "such as those" signifies that the list which follows them is merely illustrative. But to conclude from this language that the list may be

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Conf.62/C.2/SR.31 (1975) (comments of Mr. Donahue of New Zealand and Mr. Mouchan of the Soviet Union). For a proposal which would have had a similar effect, see the proposal of Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands, United Kingdom and Northern Ireland, U.N. Doc. A/Conf.62/C.2/L.54, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 229 (1975). That proposal, in relevant part, states:

> It is clear that in any comprehensive convention on the law of the sea articles setting out the rights and duties of States on the high seas must be included. Such rights and duties are at present codified in the 1958 Geneva Convention on the High Seas. It is likely that some provisions of that Convention will need some modification in the light of the conclusions reached by this Conference. However, it is the view of the sponsors that the principles and provisions contained in the Convention on the High Seas are otherwise valid, must remain in force for areas beyond the territorial sea, and should be incorporated in any new comprehensive convention on the law of the sea adopted by this Conference.

Id. See also the proposal of the United States, U.N. Doc. A/Conf.62/C.2/L.79, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 239 (1975). The United States proposal stated:

> The regime of the high seas, as codified in the 1958 Geneva Convention of the High Seas, shall apply as modified by the provisions of this chapter and the other provisions of this Convention, including *inter alia* those with respect to the economic zone, the continental shelf, the protection of the marine environment, scientific research and the international sea-bed area.

Id.

296. This seems to be the position taken in Oxman, *The New Law of the Sea*, 69 A.B.A. J. 156, 159 (1983) ("[The] category may cover a gamut of uses — for example, recreational swimming, weather monitoring, and various naval operations.")

expanded to cover all military uses involving the conduct of maneuvers or the emplacement of weapons or detection devices which are simply comparable in nature or appearance to navigation, overflight, cables and pipelines does not accord meaning to the context in which the words are used. The words are used in a reference reading "such as those *associated with the operation*" of ships, aircraft and submarine cables and pipelines. The impression which naturally arises from the use of the italicized words is that for the use or object to be considered "related to" navigation, overflight, and the laying of submarine cables and pipelines, it must assist or be essential to the exercise of one of those enumerated freedoms in the same manner in which objects used to secure cables and pipelines to the ocean floor, or onboard meterological forecasting equipment used to improve the safety of ocean travel, are associated with the operation of ships, aircraft and cables and pipelines.[297] Examples might include the periodic use of deep sea divers to check the functioning of existing cables and pipelines, as well as the deployment of some seabed-based navigational aids[298] designed to assist vessels in avoiding underwater geological obstructions. Since something like recreational swimming, however, may only be similar in character to an enumerated freedom — i.e., navigation — and not linked to its effectuation, support for its exercise cannot be found in Article 58(1).

Confirmation of the foregoing position seems to appear in the record of the development of Article 58(1). Specifically, up to the time of the drafting of the informal composite negotiating text (ICNT), following the conclusion of the sixth session held in New York during the early summer of 1977,[299] no reference to "such as those associated with the operation of ships, aircraft and submarine cables and pipelines" appeared. Indeed, the

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297. Notice that this interpretation places emphasis on the words "associated with the operation" rather than the words "such as those." For a similar interpretation, see Clingan, *Freedom of Navigation in a Post-UNCLOS III, Environment*, 46 L. & CONTEMP. PROBS. 107, 116 (1983). He states that the phrase at issue was added to Article 58(1) "to make clear that while coastal states were entitled to any unspecified residual rights in connection with resource exploitation, other states could exercise any unspecified residual rights *associated with* the basic freedoms specified." *Id.* (emphasis added).

298. These uses, which are "associated with the operation" of ships, aircraft and submarine cables and pipelines, though not as intimately as objects used to secure cables and pipelines and onboard meterological equipment, are subject to the limitations discussed *infra* in Section III(C)(2). In particular note that the limitations in Section III(C)(2)(b)(i), dealing with "installations and structures," would prohibit navigational aids which "may interfere" with coastal state rights in the EEZ.

299. *See* Informal Composite Negotiating Text, U.N. Doc. A/Conf.62/WP.10, *reprinted in* 8 UNCLOS III, Off. Rec., *supra* note 278, at 13, art. 58, para. 1 (1977) [hereinafter cited as ICNT].

predecessors of Article 58(1) simply contained an enumeration of navigation, overflight, and the laying of submarine cables and pipelines as rights or freedoms available to all states and then followed this with reference to the existence of other uses of the sea "related to navigation and communication."[300] Thus, the possibility of reading this language to include foreign state military uses or objects similar in character, configuration, or appearance may have existed. With the addition of the explanatory reference reflected in the Convention itself, the possibility seems to have been foreclosed.[301] The type of relatedness envisioned by the words "related to" is determined by the reference to "such as those associated with" the operation of ships, aircraft, cables and pipelines.

Beyond the problem of the type of relatedness required by Article 58(1), the language of that provision appears to raise another nettlesome matter. Basically, it is one which exists because the words "related to" are not prefaced by the word "directly." This absence presents the possibility of it being contended that foreign state efforts to emplace devices designed to detect, identify, locate, and track the coastal state's submarines are permitted by 58(1). Such a contention might rest on the fact that, since the military information the ASW devices develop assists emplacing state's surface ships, SSBNs, and antisubmarine submarines and enhances the likelihood of them accomplishing their operational objectives, such devices

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300. *See* Article 47(1) of the Informal Single Negotiating Text, U.N. Doc. A/Conf.62/WP.8, *reprinted in* 4 UNCLOS III, Off. Rec., *supra* note 278, at 137, *and* 14 Int'l Legal Materials 689 (1975) [hereinafter cited as INST]. Article 47(1) of the INST states: "All States, whether coastal or land-locked shall, subject to the relevant provisions of the present Convention, enjoy in the exclusive economic zone the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea." *Id.* Article 46(1) of the Revised Single Negotiating Text notes:

> In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of the present Convention, the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication.

Revised Single Negotiating Text, U.N. Doc. A/Conf. 62/WP.8/Rev.1, *reprinted in* 5 UNCLOS III, Off. Rec., *supra* note 278, at 160 (1976) [hereinafter cited as RSNT].

301. During the fifth session, in 1976, the Second Committee conducted much of the work on the EEZ provisions in informal sessions for which no records exist. *See* Report of the Chairman of the Second Committee, U.N. Doc. A/Conf.62/L.17, *reprinted in* 6 UNCLOS III, Off. Rec., *supra* note 278, at 135 (1977). It is known, however, that the committee was examining Article 4 of the RSNT, Article 58(1)'s predecessor, with great and intense interest. *See id.* at 137. At the sixth session the informal system of meetings continued, *see* Oxman, *supra* note 278, at 67, and though no records exist, some have suggested that the Second Committee consciously preferred the ICNT's version of the provision on the EEZ — which includes the addition to 58(1) — to that contained in the RSNT. *Id.*

are related to navigation by virtue of their association with the operation of ships.[302]

Though it would be difficult to defend the assertion that this view is totally lacking in persuasiveness, it appears that foreign state uses or objects contended to be associated with the operation of ships, aircraft, or cables and pipelines are permissible only when *directly* related to navigation, overflight, or the laying of submarine cables and pipelines. This assessment was voiced, without opposition, by both Mr. Schreiber, of Peru, and Mr.Zegers, of Chile, during the Conference's reported consideration of the EEZ occurring at the 1974 second session in Caracas.[303] Even in the absence of such supportive negotiating history, it is clear that acceptance of any other view would lead to the suggestion that the deployment of weapons is also authorized by 58(1). After all, weapons, as well as ASW devices, enhance the likelihood of the emplacing state's military vessels being able to accomplish their operational objectives. Therefore, their deployment could be viewed as "related to" navigation. A more absurd suggestion would be difficult to imagine. Surely no one understood uses of this sort as being expressly authorized by the terms "related to." To maintain that they did fails to ascribe significance to two critical facts. The first is that Article 58(1) carefully avoids incorporation of language of any of the proposals on the EEZ submitted during UNCLOS III which would have explicitly authorized the conduct of uses or the emplacement of objects, even though such uses or objects may have had no direct relation to navigation, overflight, or the laying of cables and pipelines. Proposals of this nature were submitted by Chile, Nicaragua, the Soviet bloc, and the United States. The language they used mentioned navigation, overflight, the laying of cables and pipelines, and then followed with references varying from "and other legitimate uses" to "any other rights recognized by the general principles of international law."[304] The second critical fact is

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302. *See* Treves, *supra* note 19, at 843.

303. *See* 2 UNCLOS III, Off. Rec., *supra* note 278, at 300, U.N. Doc. A/Conf.62/C.2/SR.45 (1975) (Schreiber, in criticizing the L.82 proposal of the African nations, *infra* note 304, stated that it did not mention the duty of ships in transit through the exclusive economic zone to behave in a peaceful manner and to abstain from "any . . . activity not *directly* related to transit." (emphasis added)); *id.* at 203, U.N. Doc. A/Conf.62/C.2/SR.26 (1975) (Mr. Zegers noted that the rights foreign states may exercise are "directly linked with the requirements of international communication.")

304. The Chilean proposal used the language "other legitimate uses of the sea." *See* U.N. Doc. A/Conf.62/L.4 (1975), *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 82. Chile's proposal, in relevant part, stated:

Article 14

In the economic zone, ships and aircraft of all States, whether coastal or not, shall enjoy freedom of navigation and overflight subject to the exercise by the

that another provision of the Convention, Article 59, contains language dealing with activities not expressly characterized as rights by Article 58(1). When these two facts are coupled, they suggest that the right of a foreign state to undertake uses or emplace objects — including ASW devices — only indirectly related to navigation, overflight, or the laying of cables and pipelines (or, for that matter, completely unrelated because not "associated with the operation" of ships, aircraft and submarine cables and

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coastal State of its rights within the area, as provided for in this convention. Article 15

The coastal State shall exercise its rights and perform its duties in the economic zone without undue interference with *other legitimate uses of the sea*, including, subject to the provisions of this convention, the laying of cables and pipelines.

Id. (emphasis added). The Nicaraguan proposal at paragraph 6 was similar:

In the national zone beyond the first 12 nautical miles referred to in the preceding paragraph, the coastal State shall guarantee to natural or juridicial persons of third States that fishing, freedom of navigation, overflight, the laying of submarine cables and pipelines, *and other legitimate uses of the zones* shall be subject to no restriction other than those provided for in this Convention and in treaties concluded subsequent thereto.

U.N. Doc. A/Conf.62/C.2/L.17, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 195 (emphasis added). The Soviet Bloc's proposal at Article 4 was as follows:

The rights of the coastal State in the economic zone shall be exercised without prejudice to the rights of all other States, whether having access to the sea or land-locked, as recognized in the provisions of this Convention and in international law, *including the right to* freedom of navigation, freedom of overflight, and freedom to lay submarine cables and pipelines.

U.N. Doc. A/Conf.62/C.2/L.38, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 214 (1975) (emphasis added). The United States' proposal at Article 7 used the following approach:

Nothing in this chapter shall affect the rights of freedom of navigation and overflight, and *other rights recognized by the general principles of international law*, except as otherwise specifically provided in this Convention. The provisions of this article do not apply to activities for which the authorization of the coastal State is required pursuant to this Convention.

U.N. Doc. A/Conf.62/C.2/L.47, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 222 (1975) (emphasis added). From the very beginning, each negotiating text reflected an approach close to that contained in the proposals of Nigeria and a group of other African nations. *Compare* Articles 47(1) of the ISNT, *supra* note 300, 46(1) of the RSNT, *id.*, 58(1) of the ICNT, *supra* note 299, 58(1) of the ICNT/Rev.1, U.N. Doc. A/Conf.62/WP.10/Rev.1 (1979), *reprinted in* 18 Int'l Legal Materials 687, 716 (1979), and 58(1) of the Draft Treaty, U.N. Doc. A/Conf.62/WP.10/Rev.3, *reprinted in* 19 Int'l Legal Materials 1129, 1163 (1982) *with* U.N. Doc. A/Conf.62/C.2/L.21/Rev.1, art. 2(1), *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 199 (1975) ("All states shall have the following rights in the exclusive economic zone of a coastal State: (a) Freedom of navigation and overflight, and (b) Freedom of laying of submarine cables and pipelines."); U.N. Doc. A/Conf.62/C.2/L.82, art. 5(1), *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 240 (1975) ("In the exclusive economic zone all States shall enjoy the fredom of navigation, overflight and laying of submarine cables and pipelines.").

pipelines) is supported, if at all, by Article 59's reference to "interests" and not by the somewhat ambiguous language of Article 58.[305]

On examining Article 59, one confronts the question of whether foreign state military uses involving the conduct of maneuvers or the emplacement of weapons and detection devices fall within the term "interests" and thereby qualify for potential authorization under the text provided therein.[306] It is difficult to know with absolute certainty what that term means. The negotiating background of Article 59's incorporation in the Convention, however, suggests that in all probability "interests" includes many of the same uses authorized under the 1958 regime, to the extent that the uses are not economic or research oriented in nature.

The records of the Conference disclose that proposals on the EEZ basically fell into two groups: those which characterized the EEZ as an international zone within which the adjacent coastal state would possess specific rights concerning resource matters; and those which characterized it as an expanded zone of national jurisdiction. The former approach, preferred by some of the major maritime powers, evidenced itself in language enumerating the freedoms appearing in Article 58(1), followed by general language effective to secure for all states — including foreign ones — those rights not explicitly granted to the coastal state.[307] The latter approach, on the other hand, simply set forth navigation, overflight, and laying of submarine cables and pipelines as the only rights foreign states were entitled to exercise.[308] In the estimation of those advancing this language, the EEZ should be a zone subject to extensive coastal state control and nothing would make that point better than a limitation on the number of rights foreign states were entitled to exercise. The language ultimately adopted reflects an approach somewhere between these two extremes.[309] By refusing to adopt the restrictive approach, however, it is clear that the delegates envisioned foreign states being able to undertake uses beyond those few spelled out in Article 58(1). Exactly what uses were envisioned is perhaps best suggested by recollection of the freedoms honored in the 1958 regime.

Nonetheless, this suggestion does not imply that the foreign state uses

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305. 1982 Convention on Law of the Sea, *supra* note 15, at art. 58, 21 Int'l Legal Materials at 1280.

306. *Id.* at art. 59, 21 Int'l Legal Materials at 1280.

307. *See supra* note 304 (proposals of Nicaragua, the Soviet Bloc, and the United States).

308. *See supra* note 304 (proposals of Nigeria and other African nations).

309. *See* Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 AM. J. INT'L L. 763, 774-81 (1975) (discussion in context of informal single negotiating text).

authorized under the earlier regime are now authorized by the rule of residual competence. The refusal of the delegates at UNCLOS III to adopt the approach associated with the view of the EEZ as an international zone signifies that the *type* of foreign state undertakings coming within the term "interests" as used in Article 59 do not retain the legal character they possessed under the 1958 regime. Under the 1958 regime, many foreign state uses other than navigation, overflight, and the laying of submarine cables and pipelines were recognized freedoms and could, in principle, be conducted as a matter of right. Under the 1982 Convention, however, which contains language that has appeared unchanged in every draft of Article 59 beginning with the informal single negotiating text (ISNT) developed at the third session in Geneva during the spring of 1975,[310] foreign states desirous of conducting such undertakings on the bed of the EEZ are simply said to have "interests" in doing so. Whether these "interests" may be given effect as *rights* in every case in which their exercise does not actually interfere with other "interests" of the coastal state is a matter which will be examined below in the section on foreign state military use. In all cases of that nature the activities take on their former legal character.

(b) Continental Shelf Beyond the EEZ

With respect to that portion of the continental shelf lying beyond the outer perimeter of the EEZ, Part VI vests the coastal state with the same "sovereign rights" over resource-related activities granted to it by the 1958 Shelf Convention.[311] In addition, it grants the coastal state exclusive rights over drilling for all purposes,[312] and the exclusive right to authorize, regulate and construct artificial islands and other objects.[313] Though not mentioned in Part VI, another provision of the Convention grants the coastal state the right to regulate, authorize, and conduct marine scientific

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310. *See* ISNT, A/Conf.62/WP.8/Part II, *supra* note 300, at art. 47, para. 3, *reprinted in* 4 UNCLOS III, Off. Rec., *supra* note 278, at 159; RSNT, *supra* note 300, at art. 47, *reprinted in* 5 UNCLOS III, *supra* note 278, at 161; ICNT, *supra* note 299, at art. 59, *reprinted in* 8 UNCLOS III, Off. Rec., *supra* note 278, at 13; ICNT Rev. 1, U.N. Doc. No. A/Conf. 62/WP.10/Rev.1 (1979), *reprinted in* 18 Int'l Legal Materials at 716; Draft Treaty, U.N. Doc. A/Conf.62/WP.10/Rev.3, at art. 58, para. 1, *reprinted in* 19 Int'l Legal Materials at 1164.

311. 1982 Convention on Law of the Sea, *supra* note 15, at art. 77, para. 1, 21 Int'l Legal Materials at 1285 (stating "coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources")

312. *Id.* at art. 81, 21 Int'l Legal Materials at 1286. For the text of Article 81, see *supra* note 290.

313. *Id.* at art. 80, 21 Int'l Legal Materials at 1286.

research.[314]

It is Article 87 of Part VII, however, rather than Articles 58(1) and 59 of Part V or any of the provisions of Part VI, which sets forth the rights foreign states — and, for that matter, the coastal state — may exercise. To be sure, Part VI does contain language purporting to grant rights or referring to rights granted by Article 87. But, as alluded to earlier, the language is unnecessarily repetitious and somewhat confusing.[315]

The specific rights provided in Article 87 parallel, with some additions, those stated in Article 2 of the 1958 High Seas Convention.[316] The listing, therefore, includes navigation and the laying of submarine cables and pipelines.[317] Beyond this, Article 87 continues the tradition of Article 2 of the 1958 High Seas Convention by prefacing the enumeration of freedoms with the words "*inter alia.*"[318] It would seem, therefore, that military uses are permissible, at least in principle. Support for that position exists in the negotiating history of UNCLOS III.[319]

Quite obviously, it is one thing to say that Article 87's reference to

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314. *Id.* at art. 246, para. 1, 21 Int'l Legal Materials at 1317.

315. *See supra* note 283 and accompanying text.

316. *See supra* text accompanying note 67.

317. Beyond this, the enumerated rights include overflight, the construction of artificial islands and other installations, fishing, and scientific research.

318. *See supra* notes 315-16.

319. During the course of the Conference's deliberations, El Salvador submitted a proposal which listed the freedoms of the seas without making reference to "*inter alia.*" *See* U.N. Doc. A/Conf.62/C.2/L.68, art. 2, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 235 (1975). The proposal, in relevant part, stated:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises for both coastal and non-coastal States:
>
> (i) Freedom of navigation;
>
> (ii) Freedom of fishing;
>
> (iii) Freedom to lay submarine cables and pipelines;
>
> (iv) Freedom of overflight;
>
> (v) Freedom of scientific research.

The Salvadoran representative, Mr. Pohl, explained that this approach was motivated by concern that open ended language of a similar nature in the 1958 High Seas Convention provided legal justification for military undertakings in the form of nuclear weapons tests. *See supra* note 295 (Pohl's explanation). For comments indicating that Article 87 may reflect Article 2 of the 1958 High Seas Convention, see 2 UNCLOS III, Off. Rec., *supra* note 278, at 236, U.N. Doc. A/Conf.62/C.2/SR.31 (1975) (comments of Mr. O'Donoghue, of New Zealand, and Mr. Mouchan, of the U.S.S.R., respectively). *See also* Oxman, *supra* note 278, at 73. Oxman suggests "peaceful purposes" does not prohibit military activities. *Id.* For this possibility to even arise, however, military activities must be authorized. The only possible authorization is found in the reference to "*inter alia.*" The refusal of the Conference to adopt that proposal certainly suggests, albeit inconclusively, that "*inter alia*" includes military uses.

"*inter alia*" suggests the inclusion of military uses, and something entirely different to say that these uses may be pursued on that portion of the shelf located beyond the economic zone. By the terms of Article 86, however, it is clear that the authorization of Article 87 applies to "all parts of the sea" situated seaward of the economic zone.[320] Two specific reasons suggest that this area includes not just the waters beyond the economic zone but the bed and subsoil as well. First, as with Article 2 of the 1958 High Seas Convention, some of the freedoms set forth in Article 87 can only be exercised in areas other than the waters of the high seas.[321] This would certainly appear to be the case with respect to the freedoms of overflight and the laying of submarine cables and pipelines. Second, the reported discussions about the continental shelf, which occurred at the 1974 Caracas session, indicate that the delegates intended to extend the principle of freedom of the seas to the bed and subsoil beneath the waters of the high seas. Interventions stressing this theme were advanced both by those who opposed as well as those who favored the continental shelf doctrine.[322]

It is not inconsistent to conclude from this that Article 87 authorizes foreign state military use of that portion of another state's continental shelf which extends beyond the EEZ, while simultaneously recognizing the coastal state's "sovereign rights" in resource-related activities. These principles have been in force since as early as the 1958 Shelf Convention, and there appears to be at least one incontrovertible piece of evidence indicating that the drafters of the 1982 Convention intended that the earlier adopted regime remain intact. Specifically, when 37 members of the Group of 77 advanced a proposal explicitly prohibiting the construction, maintenance, deployment, or operation of any military installation or

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320. *See supra* note 283 and accompanying text.

321. *See supra* notes 74-78 and accompanying text for similar reasons under the 1958 Convention. In this context, note that Article 112 of the 1982 Convention on the Law of the Sea, *supra* note 15, 21 Int'l Legal Materials at 1290, provides that the right to lay submarine cables and pipelines applies to the bed of the high seas.

322. *See* 2 UNCLOS III, Off. Rec., *supra* note 278, at 152, U.N. Doc. A/Conf.62/C.2/SR.18 (1975). Mr. Upadhyaya of Nepal made a comment to the effect that "the principle of [freedom of] the high seas . . . prohibited individual States from claiming any part [of the high seas], including the *seabed and its subsoil*." *Id.* (emphasis added). The comment was made in the context of opposition to the notion of the continental shelf, and indicates the principle's applicability to the seabed and subsoil. A proposal submitted by the United States, U.N. Doc. A/Conf.62/C.2/L.47 (1975), *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 222, 225, provided in Article 26 that rights of navigation, overflight, "and other rights recognized by the general principles of international law" set forth in Article 7 apply to the seabed and subsoil of the continental shelf. While this particular proposal was not adopted, it signifies acceptance of the notion that the high seas freedoms apply to the seabed and subsoil.

device "on or over the continental shelf of another state,"[323] the Conference hesitated and ultimately refused to embrace the notion.[324] Thus, it seems rather clear that the regime of the continental shelf stands in stark contrast with that of the economic zone. Under the former, the reference to "*inter alia*" signifies that many uses beyond those specifically enumerated in Article 87 are perceived as freedoms. Under the latter provision, uses beyond those listed in 58(1) are simply characterized as "interests." Moreover, it is the rule of freedom which applies to the continental shelf and the rule of residual competence stated in Article 59 which applies to the EEZ.[325] In principle, foreign states are authorized as a matter of right to undertake military uses on that portion of another state's continental shelf extending beyond the economic zone, even though the coastal state is vested with "sovereign rights" for resource-related purposes. Foreign states must satisfy the test established by Article 59 for similar efforts on the bed of the EEZ to possess the same character as a legal right.

(c) Matter of Foreign State Scientific Research

The earlier discussion of scientific research disclosed that under Article 5(8) of the 1958 Shelf Convention "any research concerning the continental shelf" was subject to advance coastal state approval.[326] It was noted that this provision included military scientific research projects regarding the seabed and subsoil of the shelf but did not cover similar research when focused outside the shelf, or other military undertakings not classified as research. In view of the negotiating history of Article 5(8)[327] and the fact that its drafters were apparently concerned only with activities directed at the continental shelf, it was concluded that the existence of an obligation to obtain consent before conducting scientific research on another state's continental shelf did not suggest of itself that foreign state military use was unlawful.

Under the 1982 Convention, the consent requirement remains intact. Article 246(1) of Part XIII grants the coastal state the right "to regulate, authorize and conduct marine scientific research" in its exclusive economic

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323. *See* U.N. Doc. A/Conf.62/C.2/L.42/Rev.1 (1975), *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278 at 220.

324. *See also* Oxman, *supra* note 278, at 73 (implicitly suggesting that military activities may be conducted on the bed of the EEZ and shelf, even in the face of the "peaceful purposes" provision).

325. *See* Treves, *supra* note 19, at 832, 842 (noting that the basic rule on the shelf is that of freedom).

326. 1958 Continental Shelf Convention, *supra* note 14, at art. 5, para. 8, 15 U.S.T. at 474, 499 U.N.T.S. at 316.

327. *See supra* notes 126-40.

zone and on its continental shelf.[328] Article 246(2) declares that this right specifically requires that foreign states interested in conducting such research "in the exclusive economic zone and on the continental shelf" obtain the consent of the coastal state before acting.[329] The balance of Article 246 improves on the 1958 research provisions and reflects a hard-fought compromise between coastal states lacking substantial scientific communities and states fortunate enough to possess them.[330] In that context, paragraph 3 of Article 246 directs the coastal state to grant consent "in normal circumstances" and obligates the coastal state to formulate and promulgate rules and procedures to ensure prompt consideration of all requests to conduct scientific research.[331]

The latter notion is given added force by the Convention's provision on implied consent.[332] Paragraph 5 of Article 246 notes that the coastal state "may however in [its] discretion" withhold consent if a project falls within any of the four enumerated categories, two of which relate to the resources of the EEZ and the continental shelf, the third to the construction and operation of artificial structures, and the fourth to supplying the coastal

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328. 1982 Convention on Law of the Sea, *supra* note 15, at art. 246, 21 Int'l Legal Materials at 1317.

329. *Id.*

330. *See* Oxman, *The Third United Nations Conference on the Law of the Sea: Seventh Session* (1978) 73 AM. J. OF INT'L L. 29-30 (1979) (coastal states without large scientific communities basically wanted a consent regime that would leave the coastal state with broad discretion, while coastal states with scientific communities favored absolute freedom of scientific research). Article 246 reflects a compromise between the two extreme views. 1982 Convention on Law of the Sea, *supra* note 15, art. 246, 21 Int'l Legal Materials at 1317.

331. 1982 Convention on Law of the Sea, *supra* note 15, at art. 246, 21 Int'l Legal Materials at 1317.

332. *Id.* at art. 252, 21 Int'l Legal Materials at 1318. Article 252 of the Convention provides:

> States or competent international organizations may proceed with a marine scientific research project six months after the date upon which the information required pursuant to article 248 was provided to the coastal State unless within four months of the receipt of the communication containing such information the coastal State has informed the State or organization conducting the research that:
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> (a) it has withheld its consent under the provisions of article 246; or
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> (b) the information given by the State or competent international organization regarding the nature or objectives of the project does not conform to the manifestly evident facts; or
>
> (c) it requires supplementary information relevant to conditions and the information provided for under articles 248 and 249; or
>
> (d) outstanding obligations exist with respect to a previous marine scientific research project carried out by that State or organization, with regard to conditions established in article 249.

Id.

state with inaccurate information about the activity being conducted.[333] Paragraph 6 of Article 246 concludes the major substantive directives by imposing a limitation on the coastal state's discretion to withhold consent whenever the foreign state research is to be conducted on that portion of the continental shelf extending beyond the outer perimeter of the economic zone.[334]

The 1982 Convention's retention of the consent regime, and its extension beyond research "concerning" the continental shelf to research "in" the EEZ and "on" the continental shelf, suggests a recurrence of the same question posed under the 1958 Shelf Convention. Specifically, how can one possibly maintain that foreign state use of another state's EEZ or continental shelf for military purposes is permitted by the 1982 Convention when simple, peaceful research cannot even be conducted without advance coastal state approval. The logic of this proposition seems especially compelling. Nevertheless, it fails to withstand scrutiny.

The most apparent deficiency in the proposition that the requirement of consent for scientific research implicitly refutes the notion that, in principle, foreign states may use another state's economic zone or continental shelf for military purposes, is the fact that the 1982 Convention expressly recognizes the existence of such a freedom in other provisions. In the context of the EEZ, one need only recall Articles 58(1) and 59, both of which were mentioned earlier. Article 58(1) refers to the freedom of "navigation" which, in light of Article 58(2)'s incorporative reference invoking Article 95,[335] includes navigation by military vessels, presumably either on the water surface or in the navigable water column.[336] Article 59

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333. *Id.* at art. 246, para. 5, 21 Int'l Legal Materials at 1317.

334. *Id.* at art. 246, para. 6, 21 Int'l Legal Materials at 1317. Article 246(6) states:

> 6. Notwithstanding the provisions of paragraph 5, coastal States may not exercise their discretion to withhold consent under subparagraph (a) of that paragraph in respect of marine scientific research projects to be undertaken in accordance with the provisions of this Part on the continental shelf, beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, outside those specific areas which coastal States may at any time publicly designate as areas in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time. Coastal States shall give reasonable notice of the designation of such areas, as well as any modifications thereto, but shall not be obliged to give details of the operations therein.

Id.

335. *Id.* at art. 95, 21 Int'l Legal Materials at 1288.

336. For a discussion on the freedom of navigation as including transit in submerged status, see Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77, 98 (1980). For a discussion on submerged navigation in the water column of the EEZ, see Clingan, *Freedom of Navigation in a Post-UNCLOS*

continues in the same vein. As already noted, it contains a list of considerations designed to be used to determine whether uses other than those identified or specified in the Convention as rights or freedoms can be transformed from mere "interests" and thus given effect as rights.[337] A ready example would include military use of that portion of the seabed and subsoil of the continental shelf now considered to be within the exclusive economic zone of a coastal state. Leaving the economic zone aside, it should be recalled that Article 86 applies the high seas freedoms of Article 87 to everything seaward of the EEZ, including that portion of the continental shelf extending beyond the zone's 200-nautical mile outer perimeter. One of the freedoms contemplated by the reference in Article 87 to "*inter alia*" is that of military use. The obvious conclusion is that if the requirement of consent for marine scientific research "in" the exclusive economic zone or "on" the continental shelf is to be seen as implicitly refuting the notion of the freedom of foreign state military use, Articles 58(1), 59, and 87 seem not to be in keeping with that implication. It cannot be maintained by advocates of the implied refutation argument that these Articles are simply express exceptions to an otherwise valid proposition. Given the breadth of ocean uses within the language of Articles 59 and 87, the basic proposition would seem to be swallowed by the so-called exceptions.

The negotiating history of Article 246 is very different from the history of Article 5(8) of the 1958 Shelf Convention which was reviewed earlier. Specifically, supporters of the consent requirement in the 1982 Convention made no statements indicating, as did supporters in 1958, that the requirement of consent for research was not intended to impair the right of foreign state military use. Instead, the record is replete with statements indicating that supporters recognized that research might have an unacceptable effect on national security as well as on resources.[338] The

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III Environment, 46 L. & CONTEMP. PROBS. 107, 118 (1983).

337. *See supra* Section III(C)(1)(a) of this Article.

338. For remarks made at the second session in Caracas, see 2 UNCLOS III, Off. Rec., *supra* note 278, at 336, U.N. Doc. A/Conf.62/C.3/SR.7 (1974) (remarks of Mr. Rasolondraibe, of Madagascar); *id.* (remarks of Mr. Vandergert, of Sri Lanka); *id.* at 340 (remarks of Mr. Sanders, of Guyana); *id.* at 343, U.N. Doc. A/Conf. 62/C.3/SR.8 (remarks of Mr. Rodriguez, of Venezuela); *id.* at 344 (remarks of Mr. Lo Yu-ju, of China); *id.* at 347, U.N. Doc. A/Conf.62/C.3/SR.9 (remarks of Mr. Momtaz, of Iran); *id.* at 351 (remarks of Mr. Needler, of Canada); *id.* at 352 (remarks of Mr. Kakodkar, of India); *id.* at 378, U.N. Doc. A/Conf.62/C.3/SR.16 (remarks of Mr. Zuleta Torres, of Colombia); *id.* (remarks of Mr. Jain, of India). For remarks made at the third session in Geneva, see 4 UNCLOS III, Off. Rec., *supra* note 278, at 97, U.N. Doc. A/Conf.62/C.3/SR.21 (1975) (remarks of Mr. Hussain, of Pakistan); *id.* (remarks of Mr. Lo Yu-ju, of China). For remarks made at the fifth session in New York, see 6 UNCLOS III, Off. Rec., *supra* note

reference in Article 246(3) to granting consent "in normal circumstances" is designed to address that concern[339] by apparently permitting a coastal state worried about marine scientific research of a military nature to consider the circumstances not normal and, accordingly, deny consent.[340] To argue from all of this, though, that the *travaux* demonstrate the accuracy of the proposition that the requirement of consent for research implies the impermissibility, as a matter of law, of clandestine foreign state military use incapable of being designated research, seems tenuous at best.

To begin with, statements made by those supporting the requirement of consent generally went no further than to suggest concern with *research* jeopardizing or impacting national security.[341] But, in addition, the

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278, at 96, U.N. Doc. A/Conf. 62/C.3/SR.30 (1976) (remarks of Mr. Rao, of India); *id.* (remarks of Mr. Lo Yu-ju, of China); *id.* at 101, U.N. Doc. A/Conf.62/C.3/SR.31 (remarks of Mr. Ateya, of Kuwait). For remarks made at the resumed eighth session in New York, see 12 UNCLOS III, Off. Rec., *supra* note 278, at 39, U.N. Doc. A/Conf.65/C.3/SR.41 (1979) (remarks of Mr. Malik, of Pakistan). For remarks made at the ninth session in New York, see 13 UNCLOS III, Off. Rec., *supra* note 278, at 21, U.N. Doc. A/Conf.62/SR.126 (1980) (remarks of Mr. Pirzada, of Pakistan); *id.* at 43, U.N. Doc. A/Conf.62/SR.128 (remarks of Mr. Tubman, of Liberia). For remarks made at the resumed ninth session in Geneva, see 14 UNCLOS III, Off. Rec., *supra* note 278, at 103, U.N. Doc. A/Conf. 62/C.3/SR.46 (1980) (remarks of Mr. Hussain, of Pakistan).

339. At the fifth session in New York during 1976, proposals were advanced by both Bahrain, 6 UNCLOS III, Off. Rec., *supra* note 278, at 97, U.N. Doc. A/Conf. 62/C.3/SR.30 (1975), and the Libyan Arab Republic, *id.* at 98, to amend the RSNT to permit a coastal state to exercise its discretion, under what is now Article 246(5), and withhold consent for any scientific research project which would affect the coastal state's security. Although the RSNT adopted neither of these proposals, its successor, the ICNT, did include in Article 247(3), the predecessor of Article 246(3), the "in normal circumstances" language. ICNT, *supra* note 299, at art. 246, para. 3, *reprinted in* 8 UNCLOS III, Off. Rec., *supra* note 278, at 42. Since the rejection of the Bahrain and Libyan proposals signaled that coastal states could not invariably withhold consent simply because research may be of a military nature, this language was included to give coastal states the right to withhold consent for such research in some situations. If the circumstances were "normal," however, the coastal state could not appropriately withhold consent. *See* Oxman, *supra* note 278, at 75-77; Oxman, *The Third United Nations Conference on the Law of The Sea: The Eighth Session*, 74 AM. J. INT'L L. 1, 25-26 (1980).

340. *See* Clingan, *Freedom of Navigation in a Post-UNCLOS III Environment*, 46 L. & CONTEMP. PROBS. 107, 180-81 (1983) (comment to this effect by Jose Luis Vallarta, Chairman of the informal consultation group on "Protection and Preservation of the Marine Environment" within the Third Committee at UNCLOS III).

341. *See, e.g.*, 2 UNCLOS III, Off. Rec., *supra* note 278, at 378, U.N. Doc. A/Conf.62/C.3/SR.16 (1974) (Mr. Zuleta Torres, of Colombia, stated that: "[t]he coastal State should, however, in order to defend its own resources and for reasons of security, regulate *research* . . . ." (emphasis added)). *See also* 13 UNCLOS III, Off. Rec., *supra* note 278, at 43, U.N. Doc. A/Conf.62/SR.128 (1980) (Mr. Tubman, of Liberia, commented that "[h]is delegation believed that everything possible should be done to promote rather than impede legitimate, genuine scientific *research*. That, however, could not be done in a manner inimical to the security interests of coastal States.") (emphasis

delegates involved in actually negotiating Article 246 apparently realized that they were not dealing with military activities other than those in the nature of research.[342] In view of these two factors, it would seem strange to infer that the delegates intended to cover by implication that which they consciously intended to leave uncovered by clear expression. This, of course, is not to say that the negotiating history of Article 246 is clear in authorizing foreign state military use in the face of the requirement of consent for scientific research. Article 246's negotiating history will never be as clear on this point as that of the 1958 Shelf Convention. There seems little doubt, however, that it does not support the idea of implied refutation.[343]

2. Limitations on Foreign State Military Use

The 1982 Convention sets forth limitations on foreign state military use of the economic zone or continental shelf of another state which fall into two distinct categories: those of specific applicability covering either the bed of the EEZ or that of the continental shelf; and those of general applicability covering the seabed areas of both zones of national jurisdiction. The fundamental limitation of specific applicability which affects foreign state military use of the bed of another state's economic zone is reflected in the very test for determining whether such use may, in principle, be carried out as a matter of right. In this respect, the limitation differs considerably from that specifically limiting military uses of that portion of the shelf extending beyond the EEZ, as well as from the limitations of general applicability which affect military use of either area of the seabed. Some of the limitations falling into the latter category derive from exclusive rights granted to the coastal state, but it is clear that these are unrelated to the provisions serving as the authorizing source of foreign state use.

(a) Limitations of Specific Applicability

(i) Articles 56(2), 58(3), and 59 and the Economic Zone

Articles 56(2), 58(3), and 59 of Part V of the Convention contain the basic limitations affecting foreign state military use of the economic zone. In relevant part, the first of these provisions declares that the coastal state,

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added).

342. *See* Oxman, *supra* note 278, at 75.

343. There are also other reasons for rejecting the notion of implied refutation. *See infra* notes 352 & 360.

in exercising its rights, "shall have due regard to the rights and duties of other states and shall act in a manner compatible with the provisions of the Convention."[344] This is counter balanced by the second provision, 58(3), which provides that foreign states, when exercising their rights, "shall have due regard to the rights and duties of the coastal state in accordance with the provisions of this Convention and other rules of international law not incompatible with this Part."[345] Given that the balancing approach reflected in the "due regard" standards set forth in these provisions applies to situations where the exercise of "rights" or the performance of "duties" by the coastal state or a foreign state affects "rights" or "duties" of the other, neither provision would seem to have much impact on efforts by foreign states to conduct military maneuvers or emplace weapons or detection devices on the bed of another state's economic zone. As we have already observed,[346] in most instances military uses of this nature do not come within Article 58(1)'s reference to navigation, cables, or pipelines, or related uses of the sea, and thus are not characterized by the Convention as "rights."

As a result of the inapplicability of Articles 56(2) and 58(3), the fundamental limitation affecting the bed of the economic zone would appear to be contained in Article 59.[347] The language of that provision seems to intimate that the "interests" it recognizes will be treated as possessing a legal character equivalent to or at least resembling that possessed by the freedoms set forth in Article 58(1) whenever such treatment is warranted by equity, the surrounding circumstances, and an assessment of the importance of the relevant interests involved.[348] Curiously enough, these criteria apply in cases where "a conflict arises between the interests of the coastal State and any other State or States."[349] Thus, the question which one is naturally inclined to ask is whether the criteria have any applicability to situations which do not involve an actual conflict between a use of the coastal state and a use of a foreign state. The effect of a negative answer would be to restrict the provision so that the criteria would neither proscribe foreign state military uses in the absence of a conflict, nor authorize foreign state military uses conflicting with coastal state activities. Whether the foreign state's use is designed to restore the military

344. 1982 Convention on Law of the Sea, *supra* note 15, at art. 56, para. 2, 21 Int'l Legal Materials at 1280.

345. *Id.* at art. 58, para. 3, 21 Int'l Legal Materials at 1280.

346. *See supra* Section III(C)(1)(a) of this Article.

347. 1982 Convention on Law of the Sea, *supra* note 15, at art. 59, 21 Int'l Legal Materials at 1280.

348. *Id.*

349. *Id.*

equilibrium by meeting legitimate security concerns, or is designed to produce a military advantage for the foreign state which threatens to alter the balance of power and thereby imperil international peace, Article 59 would not apply.

The foremost reason for rejecting this reading is found in the language of the provision itself. Observe that the excerpt quoted above refers to a "conflict [arising] between the interests" of a coastal state and a foreign state. It has already been suggested that the negotiating history of Article 59's rule of residual competence indicates that the term "interests" at least includes recognition of all those types of uses which were considered high seas freedoms under the 1958 regime and are not reserved by the provisions of Part V of the 1982 Convention to the coastal state or foreign states. Additionally, when the term is read in conjunction with the reference to a "conflict [arising]" it signifies a conflict not only between actual uses of the type just alluded to but also between "interests" as understood in their purest sense. The effect is twofold. The criteria of Article 59 determine which of two uses prevail when use of a coastal state and that of a foreign state happen to conflict. Additionally, the criteria also determine whether efforts directed at giving effect to some uses may even be initiated if the effect would be to create a conflict with the interests — as distinguished from the uses — of another state. Supporting the latter as a component of the approach taken by Article 59 is that provision's reliance on the term "interests" rather than the term "uses." Had the language selected referred to a "conflict [arising] between the *uses* of the coastal State and any other State or States," the preceding interpretation would have been precluded. That kind of alternative language could not have been avoided by the delegates at UNCLOS III because of legitimate fear that "uses" may have led to confusion over the precise types of uses they were trying to recognize in Article 59. "Uses" and "interests" are equally distinct from "rights" and, given the background relating to Article 59's adoption, would have imparted the same meaning. Therefore, it seems clear that when "interests" is read in conjunction with the reference to a "conflict [arising]" it means to cover conflicts of *interests* in addition to conflicts of *uses*.

This notion of a two-pronged approach is already somewhat familiar. As discussed in the context of the balancing test used under the 1958 shelf regime, everything from the initiation of foreign state military use to actual military conduct in the face of conflict with coastal state military or resource-related activity is open to scrutiny. Article 59's reference to equity, the surrounding circumstances, and an assessment of the importance of the relevant interests involved to the parties as well as to the

international community as a whole recalls, in a more general sense, the same factors used in the balancing test of the 1958 regime. Since the end product of the application of Article 59's balancing test will be identical to that under the 1958 shelf regime, one wonders what is gained by taking the kind of narrow view of Article 59 which was described and rejected above. If the criteria set forth in Article 59 are triggered only by an actual conflict of uses, one would seem obliged to fall back on the customarily used balancing test in order to deal with situations where a foreign state military use does not conflict with coastal state military or resource-related activity. In doing so, it seems clear that the only foreign state military uses which may lawfully be conducted are those which are designed to restore the military equilibrium, meet legitimate security concerns, and serve to buttress international stability. It does not matter whether such uses be undertaken in a fashion which carefully avoids or inescapably creates conflict with coastal state military or resource-related activities.[350] In either instance the same degree of disapproval results since logic dictates that peace and stability must be preferred over economic and material well-being.

Similarly, the very initiation of foreign state efforts designed to give effect to military uses which would place the coastal state in a position of military inferiority seem to be prohibited. Military maneuvers, the emplacement of weapons, and the deployment of detection devices integrated with a larger military network which is able to neutralize the coastal state's naval vessels cannot be pursued if designed to obtain a military advantage for the foreign state. The ability of a foreign state to fully implement these military uses if they do not conflict with activities of the coastal state stands for little. Any other conclusion would lead to predictable coastal state responsive action, which is likely to exacerbate an already tense situation and, further, lead to a disruption of the balance of power which could have rather untoward effects on the world community. The mere fact that the balancing test of Article 59 is phrased in terms of equity, the surrounding circumstances, and the relative importance of the various interests involved to the parties as well as to the international community as a whole does not alter the conclusion. As with the customarily used balancing test, the test provided for in Article 59 seeks to promote security and international stability by establishing a codified legal standard that mirrors the values on which states normally act.

At least one commentator has suggested that even though Article 59's balancing test will apply to a conflict of interests as well as a conflict of uses,

350. *See supra* Section III(B)(2)(b) of this Article.

foreign state efforts to emplace military objects other than weapons on the bed of another state's economic zone cannot, therefore, conflict with the coastal state's security interests.[351] The result, this commentator concludes, is that emplacement efforts of that sort are permitted and need not be preceded by negotiations resulting in the military use being expressly authorized.

An apparent inconsistency exists between admitting the possibility that Article 59 may prohibit the emplacement of weapons and arguing that for other military objects Article 59 applies during the course of negotiations or settlement efforts occurring after emplacement and may result in an agreement or decision concerning their removal. If the emplacement of weapons would create such a conflict with the interests of a coastal state that the activity would be prohibited by the criteria contained in Article 59, it would seem that any foreign state military undertaking creating a conflict of comparable dimensions would be similarly prohibited. To maintain that this is not the case and insist that a foreign state can pursue such efforts until there is an agreement or decision of removal or termination subjects the coastal state to threats which Article 59 would not otherwise permit. Adherence to this position seems based on an assumption that military uses not involving the emplacement of weapons cannot conflict with the coastal state's basic security interests. The most appropriate approach would be to recognize that there are many kinds of foreign state military uses which possess the potential for creating conflicts with the coastal state's security interests. If equity, the surrounding circumstances, and an assessment of the relative value of the interests concerned suggest that they cannot be initiated, it matters little whether the military uses involve the emplacement of weapons. In this category any detection devices which, because of their integration with a larger military network, are able to neutralize the coastal state's naval vessels, thereby threatening to create international instability.[352]

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351. *See* Treves, *supra* note 19, at 845.

352. In addition to providing a standard for resolving conflicts with coastal state uses or interests caused by foreign state military undertakings, Article 59 supports the rejection of the notion that consent for scientific research implies that foreign states do not have, even in principle, the right to use the bed of another state's EEZ for military purposes. *See supra* notes 349-51 and accompanying text. This, of course, was said to derive from the fact that, since the term "interests" as used in Article 59 includes all military uses recognized as permissible under the 1958 regime, the 1982 Convention contains an express grant (assuming the balancing test of Article 59 is passed) which is inconsistent with the asserted implication. *Id.* At this juncture, it should be observed that Article 59 seems to support the rejection of that same notion in a somewhat different fashion. Specifically, by articulating a balancing test applicable to situations where a conflict arises between the interests of the coastal state (claimed to exist by an implication from the requirement of consent for simple,

(ii) Articles 78(2), 87(2), and the Continental Shelf

Just as Article 59 enunciates a principle applicable to uses of the bed of the economic zone, Article 78(2) of Part VI and 87(2) of Part VII enunciate principles applicable to uses of that portion of the continental shelf extending beyond the EEZ's outer perimeter.[353] Recall that Article 5(1) of the 1958 Shelf Convention requires coastal states, when exercising sovereign rights of exploration and exploitation, to refrain from causing "unjustifiable interference" with navigation by foreign states.[354] Article 78(2) of the 1982 Convention also contains a restraint on "unjustifiable interference" with navigation, but extends the restraint to include "other rights and freedoms . . . provided for in [the] Convention" as well.[355] Whereas Article 87(1)'s reference to "*inter alia*" signifies, as has already been noted, that one of the "other rights and freedoms" is that of military use, Article 78(2) thus clearly affects the exercise of that right. Any adequate understanding of the limitations on foreign state military use in relation to coastal state resource-related activity cannot be developed without taking that provision into consideration.

There are two particular matters of interest with respect to Article 78(2) which require comment. First, like Article 5(1) of the Shelf Convention, Article 78(2) is specifically designed to prohibit the *coastal state* from exercising its resource-related rights in a manner which interferes unjustifiably with some right or rights of foreign states.[356] Though neither provision is directed explicitly at foreign states, it would seem to be a mistake to conclude that no limitation emerges on the exercise of foreign state rights. By approving coastal state activities up to the point at which they interfere unjustifiably, Articles 5(1) and 78(2) place an

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peaceful research) and the foreign state (claimed to exist because "interests" includes military uses recognized under the 1958 regime), Article 59 suggests that one cannot automatically conclude that consent for scientific research implies that, as a matter of law, foreign state military use is impermissible. This conclusion can only be arrived at after considering the criteria so clearly spelled out. Interestingly, if there are some cases where a coastal state's assertion of a conflict with an interest in security fails to result in the foreign state military use being impermissible, surely an assertion of impermissibility based on a mere implication should be viewed as much less compelling.

353. 1982 Convention on Law of the Sea, *supra* note 15, at art. 78, para. 2, 21 Int'l Legal Materials at 1285 ("[t]he exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention").

354. *See supra* Section III(B)(2)(a).

355. *See supra* note 353.

356. *Id.*

indirect limitation on foreign state rights.[357] More particularly, to the extent that foreign state rights may lawfully be interfered with by coastal state resource-related activity, those rights must necessarily be considered limited.

Secondly, under the 1958 regime the "unjustifiable interference" standard clearly unravels into a balancing test. Since each of the officially reported proposals on Article 78(2) reiterate that standard[358] and, since no expression to the contrary appears in the official records of UNCLOS III, it would seem quite fair to carry the balancing test over to the 1982 Convention. Given this, the extension to "other rights and freedoms . . . provided for in [the] Convention" would seem to eliminate the doubt which surrounds the 1958 Shelf Convention regarding whether "unjustifiable interference" states a hierarchical approach to resolving conflicts among foreign state military use and coastal state resource-related activity.[359] The notion of the coastal state's resource-related rights invariably prevailing over, or — if you so prefer — being left inferior to a foreign state military use is categorically rejected. To this extent, Article 78(2) is a significant improvement on the earlier regime.[360]

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357. There is no language of direct limitation in Article 78(2). 1982 Convention on Law of the Sea, *supra* note 15, at art. 78, para. 2, 21 Int'l Legal Materials at 1285.

358. *See* U.N. Doc. A/Conf.62/L.8/Rev.1, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 118, provision 73 (1975). One earlier proposal stated:

> *Formula A*
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> The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.
>
> Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.
>
> *Formula B*
>
> The exercise of the coastal State' rights over the continental shelf shall not result in any unjustifiable interference with the freedom of navigation in the superjacent waters and of overflight in the superjacent air space, nor shall it impede the use of recognized lanes essential to international navigation.
>
> *Formula C*
>
> The coastal State shall exercise its rights and perform its duties without unjustifiable interference with navigation or other uses of the sea, and ensure compliance with applicable international standards established by the appropriate international organizations for this purpose.

Id.

359. *See supra* Section III(B)(2)(b).

360. A point closely related to that made *supra*, at note 352, is that Article 78(2) rejects the notion that consent for scientific research implies that foreign states do not have, even in principle, the right to use another state's continental shelf for military purposes.

When a foreign state military use conflicts with coastal military activity, the appropriate standard is found in Article 87(2).[361] Like the second paragraph of Article 2 of the 1958 High Seas Convention, Article 87(2) sets forth a standard to resolve conflicts between a high seas freedom exercised by one state and that exercised by another state. The only difference from the standard contained in the earlier convention is that under 87(2) states are obligated to exercise their freedoms with "due regard," rather than with "reasonable regard," for the freedoms of other states.[362] The phrase "due regard" made its first appearance in the Convention itself; all earlier draft texts used the phrase "due consideration." Whether the change from "reasonable regard" was meant to have some effect on the elements configuring the 1958 standard is uncertain.[363]

Earlier, it was observed that the articulation in Article 59 of a balancing test applicable to military uses suggests that one cannot automatically conclude that consent for research implies the impermissibility of such uses. *See supra* note 352. Similarly, Article 78(2) suggests an identical result by requiring the coastal state to avoid exercising its rights over the shelf in a manner causing "unjustifiable interference" with "other rights and freedoms of other states." 1982 Convention on Law of the Sea, *supra* note 15, at art. 78, para. 2, 21 Int'l Legal Materials at 1285. This is supported by the history of Article 78(2), which indicates it was essentially formulated to deal with the affect that coastal state rights over scientific research beyond the outer perimeter of the economic zone might be perceived as having on the freedoms proposed in Article 87. *See* Report of the Chairman of the Second Committee, 11 UNCLOS III, Off. Rec., *supra* note 278, at 101, 102, U.N. Doc. A/Conf.62/L.38 (1979). The report notes a proposal by the Chairman of Negotiating Group 6 of the Second Committee containing the identical language reflected in Article 78(2) of the Convention. *Id.* Of this proposal Mr. Goerner, of the German Democratic Republic, stated in Plenary that "[t]he suggestions put forward . . . represented an improvement on the . . . negotiating test." *Id.* at 35, para. 108, U.N. Doc. A/Conf.62/SR.166 (1979). With regard to Article 78(2) he noted that "the [ICNT] provisions on the legal regime of the continental shelf also need to be improved with a view to ensuring that *the freedoms of the high seas would be preserved intact." Id.* (emphasis added). While it has been suggested that the primary concern was with preserving the freedoms of the *waters* of the high seas, *see* Oxman, *supra* note 330, at 22; and Oxman, *supra* note 339, at 26, the language of Article 78(2) is broad enough to apply to all high seas freedoms, including those which can be exercised in the airspace above or on the bed below the waters of the high seas.

361. Article 87(2) states: "These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Areas." 1982 Convention on Law of the Sea, *supra* note 15, at 1287, art. 87, para. 2.

362. *Compare* Article 87(2), *id., with* 1958 High Seas Convention, art. 2, *supra* notes 237-38.

363. Discussion on the standard reflected in Article 87(2) is contained in the records of the Caracas session. Only the Soviet delegate, Mr. Mouchan, commented on resolving conflicting uses at that session. *See* 2 UNCLOS III, Off. Rec., *supra* note 278, at 237, U.N. Doc. A/Conf.62/C.2/SR.31 (1975). He noted that "due account" should be taken of other states' rights. *Id.* No explanation exists as to the nature of the "due account" test. Since deep seabed mining was an issue of tremendous concern at UNCLOS III, and many who have argued its lawfulness have relied on, among other things, the "reasonable regard"

Nevertheless, it would seem peculiar to maintain that change has reconfigured the elements of the earlier balancing test so that the coastal state has a stronger claim against *all* foreign state military uses on the shelf beyond 200-nautical miles from its shore-line than it has against such uses on the bed of the economic zone located within 200-nautical miles. Although foreign state conduct of maneuvers, emplacement of weapons, and deployment of sensitive detection devices are not generally preferred over coastal state military activity with which they conflict, these activities may still prove lawful in the few instances where they are designed to restore military equilibrium, meet legitimate security concerns, and serve to promote international peace and stability.[364]

Nonetheless, neither Article 78(2) nor Article 87(2) have gone far enough. By their terms their respective balancing tests are applicable only to situations involving interference between the actual exercise of rights of the coastal state and rights of the foreign state. It would appear, therefore, that neither provision expressly calls for application of a balancing test unless an actual *conflict of uses* exists. In short, the very terms of Articles 78(2) and 87(2) do not prohibit the initiation of foreign state military uses which are prohibited because of an unacceptable *conflict of interests*. Rather, they are limited to situations in which foreign state military uses have been pursued and eventually conflict with some coastal state resource-related or military activity. Once again, the unstated, customarily-used balancing approach must be applied to determine whether a foreign state is prohibited from initiating a certain type of military use.

(b) Limitations of General Applicability

(i) Article 60(1)(c): "Structures" v. "Devices"

Under Articles 59, 78(2), and customary principles of law, the economic zone and that portion of the shelf located beyond the EEZ's outer perimeter are subject to the balancing test. In most conceivable instances the effect is that foreign state military uses must give way to conflicting resource-related or military activities of the coastal state. Indeed, the only situation in which foreign state military use may be initiated and then carried on in the face of conflict with coastal state activity is if the use is

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language of the second paragraph of Article 2 of the 1958 High Seas Convention, it is at least possible that the change reflects an attempt to remove that argument, and does not otherwise alter the elements of the time-honored balancing test reflected in the concept of reasonableness.

364. For a similar result under the 1958 Regime, see Section III(B)(2)(b) of this Article.

designed to restore the military equilibrium.[365] Article 60(1)(c),[366] however, contains a limitation of general applicability which further restricts activity of such an exceptional character. It does so by providing the coastal state with the "exclusive right" to construct or authorize the construction, operation, and use of "installations and structures which may interfere with the exercise of the rights of the coastal state."[367] The description of the coastal state's right as "exclusive" suggests that foreign state emplacement is permissible only if consented to by the coastal state. Without consent, it would seem to matter little whether the foreign state's objects are designed to accomplish military objectives and are of exceptional character which would make their emplacement otherwise permissible. If the objects may, or do, interfere with economic or resource-related activities of the coastal state their emplacement would seem to be prohibited.

Clearly, the coastal state is not vested with a similar exclusive right over military objects which do not interfere with economic or resource-related activities. This fact is explicit from the very terms of Article 60(1)(c) and also from the refusal of delegates at the resumed ninth session of the Conference to favor a proposal of Brazil and Uruguay giving the coastal state an exclusive right over all installations and structures.[368]

Although it would seem that military objects which may, or do, interfere with coastal state economic or resource-related activities are prohibited, one might suggest that this is not necessarily so. Stated succinctly, this argument would proceed by observing that Article 60(1)(c) speaks of an exclusive right to construct, authorize and regulate the construction, operation, and use of "installations and structures." In juxtaposition, however, the 1958 Shelf Convention entitles the coastal state to construct and maintain or operate "installations and other devices."[369] The difference in language, therefore, might be said to

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365. *See supra* Section III(C)(1).

366. 1982 Convention on Law of the Sea, *supra* note 15, at art. 60, para. 1(c), 21 Int'l Legal Materials at 1280-81. This applies to the economic zone alone. Article 80, however, applies the same standard to the shelf. *Id.* at art. 80, 21 Int'l Legal Materials at 1286.

367. If installations and structures which "may interfere" are prohibited, those which do interfere are clearly prohibited.

368. *See* Reply to Zedalis, *supra* note 149, at 935 n.1. Brazil's representative, Mr. Calero Rodrigues, noted that the "sea beyond the [territorial sea] should not be used in a manner detrimental to the security of the coastal state." *See* 14 UNCLOS III, Off. Rec., *supra* note 278, at 33, U.N. Doc. A/Conf.62/SR.136 (1982). At the session held during the summer of 1980, Mr. Lupinacci, of Uruguay maintained that this could best be accomplished by simplifying Article 60(1)(c) so that it "[would] not admit of any exception or limitation with regard to types of installations or structures." *Id.* at 80, U.N. Doc. A/Conf.62/SR.140 (1982).

369. 1958 Continental Shelf Convention, *supra* note 14, at art. 5, para. 2, 15 U.S.T. at

evidence the fact that military objects which are designed to restore parity, meet legitimate security concerns, and serve to buttress international stability may lawfully be emplaced on the bed of the EEZ or continental shelf, even though they interfere with the coastal state's economic and resource-related rights, so long as the objects may be considered "devices."[370]

It seems clear that if the term "devices" had been deleted from the Convention with nothing inserted in lieu thereof, one might be able to make a rather persuasive argument that many objects previously covered now lay outside the coastal state's exclusive domain of construction, operation, and use. That is to say that if the Convention had vested the coastal state with exclusive rights over "installations" alone, one could more easily argue that the Convention did not extend the coastal state's authority to "devices." But use of the term "structures" in lieu of "devices" places one in the difficult position of reaching a similar result only by demonstrating that "structures" has a narrower meaning covering a much smaller number of objects than does the term "devices."[371] A successful demonstration of this could remove from the coastal state's exclusive domain antisubmarine warfare (ASW) devices (e.g., weapons and detection devices) which do, or may, interfere with economic and resource-related activities. Several problems, however, would be encountered in any such undertaking.

At the outset, nothing in the negotiating background relating to the adoption of the reference to "installations and structures" supports the notion that "structures" was intended to have a narrow, circumscribed meaning. Five officially reported proposals dealing with coastal state authority over artificial islands and various other objects were submitted during the Conference's deliberations. Four of the proposals referred to "artificial islands and installations,"[372] and the fifth to "installations and

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473-74, 499 U.N.T.S. at 314. Article 71 of the ILC's 1956 draft convention used only the term "installations." The word "devices" apparently made its way into the Shelf Convention when a proposal submitted by Mr. Mouton of the Netherlands was adopted. U.N. Doc A/Conf.13/C.4/L.22, *reprinted in* 6 UNCLOS I, Off. Rec., *supra* note 60, at 132 (1958). No discussion concerning the term accompanied its adoption.

370. Treves, *supra* note 19, at 841, argues that the difference results in some objects not considered "installations" or "structures" being left untouched by the grant of exclusive rights to the coastal state.

371. *Id.*

372. These were the proposals of Nigeria, the United States, Gambia, Canada and others. Article 16 of the proposal submitted by Canada, *et al*, U.N. Doc. A/Conf.62/L.4, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 81, 83 (1975), stated: "The emplacement and use of artificial islands and other installations on the surface of the sea, in the waters and on the sea-bed and subsoil of the economic zone shall be subject to the authorization and regulation of the coastal State." Article 3(4) of the Nigerian proposal,

other facilities."[373] As best as can be determined, "structures" made its original appearance in the April 16, 1975 unofficially reported proposal of the Evensen Group of the Second Committee.[374] No explanation for its adoption by that Group or for its subsequent incorporation in the informal single negotiating text[375] has yet been recounted by those with special knowledge of the circumstances surrounding its selection.

Considerably more important, however, is the fact that reading "structures" as not including "devices" would lead to some rather perverse results in other contexts. Specifically, it would relieve the coastal state from the requirement of establishing a permanent means for giving warning of devices used in connection with resource-related activities and emplaced on the bed of the economic zone or the continental shelf.[376] It would also relieve the coastal state from having to remove similar devices no longer useful.[377] And, further, it would relieve the coastal state from the obligation to refrain from interfering with international navigation by avoiding the emplacement of devices in recognized sea lanes.[378] In short, by simply using objects too small to be considered "structures," the coastal state could escape obligations which have been integral parts of international law of the sea.[379]

U.N. Doc. A/Conf.62/C.2/L.21/Rev.1, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 199 (1975), stated: "A coastal State shall not erect or establish artificial islands and other installations, including safety zones around them, in such a manner as to interfere with the use by all States or recognized sea lands and traffic separation schemes essential to international navigation." Article 3(1) of the United States' proposal, U.N. Doc. A/Conf.62/C.2/L.47, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 222 (1975), used the following language:

> The coastal State shall have the exclusive right to authorize and regulate, in the economic zone, the construction, operation and use of artificial islands and installations for the purpose of exploration and exploitation of natural resources, or for other economic purposes, and of any installation which may interfere with the exercise of the rights of the coastal State in the economic zone.

The proposal submitted by Gambia, *et al.*, U.N. Doc. A/Conf.62/C.2/L.82, *id.* at 240, 241 (1975), stated in Article 4(b): "A coastal State shall have the exclusive right to make and enforce regulations relating to, *inter alia* the following: . . . (b) The construction, emplacement, operation and use of artificial islands and other installations. . . ."

373. U.N. Doc. A/Conf.62/C.2/L.38, art. 7, para. 1, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 214, 215 (1975) (submitted by Bulgaria and others).

374. *See* Third United Nations Conference on the Law of the Sea, Documents of the Geneva Session 273 (ed. Platzoder 1975) (arts. 1(1)(c), 4(1)(b)).

375. *See* ISNT, *supra* note 300, at 722, art. 48, para. 1(c).

376. *See* 1982 Convention on Law of the Sea, *supra* note 15, at art. 56, para. 3, 21 Int'l Legal Materials at 1281.

377. *Id.*

378. *Id.*, art. 56, para. 7.

379. *See* text accompanying notes 173-234 (establishing that navigation, among others, is an extremely valued right). The basic thrust of Article 5 of the 1958 Continental

But perhaps the single most disturbing problem with giving "structures" a narrow reading is that it runs contrary to the Convention's basic thrust of increasing coastal state authority over the economic zone and shelf beyond.[380] The 1958 Shelf Convention vests the coastal state with "sovereign rights" to explore the shelf and exploit its natural resources. As alluded to earlier, Parts V and VI of the 1982 Convention reaffirm these rights and provide, further, for many additional sovereign and exclusive rights. Therefore, to maintain that use of the term of "structures" rather than "devices" signifies a diminution in the coastal state's 1958 rights seems somewhat incongruous. A better interpretation might be that while "devices" refers to objects with operational characteristics or functional attributes, "structures" should be more broadly interpreted to include all objects affected, shaped, or constructed by the intervention of man. This interpretation is not only consistent with the thrust of the Convention, but avoids the perversions consequent to giving "structures" a narrow reading in other contexts. Irrespective of the object's size, adequate measures must be taken to insure that the object does not imperil the safety of international navigation. Furthermore, a broad interpretation avoids the difficulty of determining how large an object must actually be before it falls within the ambit of the term "structures." Similar difficulties may also arise in determining whether an object has been affected, shaped, or constructed by the intervention of man, but they seem easier to resolve.

(ii) Article 81 and Drilling

Article 81 contains a second limitation on foreign state military use of the continental shelf which augments the general limitation of Article 60(1)(c). Article 81, applying to the bed of the economic zone as well as the

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Shelf Convention is to establish a standard permitting the right of navigation and the coastal state's sovereign rights to be accommodated. 1958 Continental Shelf Convention, *supra* note 14, at art. 5, 15 U.S.T. at 473-74, 499 U.N.T.S. at 314-16. Interestingly enough, Article 5(1) prohibits "unjustifiable interference." *Id.*, art. 5, para. 1. The reference in Article 5(6) to prohibiting the emplacement of installations and devices which may cause "interference" to recognized sealanes is explained by the ILC's commentary 7 on the 1956 draft of Article 5's predecessor as being an advance application of the "unjustifiable" interference standard. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) at 46, 47, art. 71, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 299, 300, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957). If one argues that objects too small to be considered "structures" are not subject to Article 60(3)-(7) of the 1982 Convention, one must be prepared to accept the notion that "unjustifiable interference" with navigation is permitted when caused by certain kinds of objects.

380. *See* Zedalis, *supra* note 368, at 931.

shelf beyond,[381] grants the coastal state the "exclusive right to authorize and regulate drilling . . . for all purposes."[382] While this right is a natural outgrowth of the coastal state's economic and resource-related interests, the reference to "for all purposes" signifies that it extends to drilling which affects those interests indirectly, if at all. Therefore, this provision establishes a further restriction on all permissible foreign state military uses. The "exclusivity" of the coastal state's right to authorize and regulate suggests that drilling associated with military uses is permissible only if consented to by the coastal state. The absence of consent has the same prohibitory effect on this activity as the absence of consent has under Article 60(1)(c) on the emplacement of installations and structures which may interfere with coastal state economic and resource-related activities.

(iii) Reservation for Peaceful Purposes

The third, and final, general limitation affecting foreign state military undertakings is that reserving the seabed to use for "peaceful purposes." This reservation, developed during the late 1960s in the General Assembly's Seabed Committee, is found in Article 88 of the 1982 Convention.[383] Article 88 reserves only the high seas to use for "peaceful purposes."[384] Article 58(2) of Part V, however, invokes the provision and specifically applies it to the economic zone.[385] Though no similar reservation or invocation appears in Part VI, the fact that that portion of the continental shelf beyond the outer perimeter of the EEZ is subject to the regime of the high seas[386] leads to the conclusion that "peaceful purposes" has applica-

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381. *See supra* notes 287 & 312. This exclusive coastal state right has appeared in each of the previously issued drafts of UNCLOS III. *See* ISNT, *supra* note 300, arts. 67, 45, para. 1(e); RSNT, *supra* note 300, arts. 69, 44, para. 1(e), *reprinted in* 5 UNCLOS III, Off. Rec., *supra* note 278, at 164, 160; ICNT, *supra* note 299, art. 56, para. 1(c), 81, *reprinted in* 8 UNCLOS III, Off. Rec., *supra* note 278, at 13, 16; Draft Treaty, *supra* note 310. From the negotiating history, it appears that two of the nations submitting proposals on the EEZ and continental shelf included language like that found in the Convention. *See* U.N. Doc. A/Conf.62/C.2/L.47, arts. 4 and 26, *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 222 (1975) (U.S. proposal, applying to both the EEZ and the Shelf); U.N. Doc. A/Conf.62/C.2/L.82, art. 4(a), *reprinted in* 3 UNCLOS III, Off. Rec., *supra* note 278, at 240 (1975) (proposal of the African nations, applying to the EEZ alone).

382. 1982 Convention on Law of the Sea, *supra* note 15, at art. 81, 21 Int'l Legal Materials at 1286.

383. *Id.* at art. 88, 21 Int'l Legal Materials at 1287.

384. *Id.* ("The high seas shall be reserved for peaceful purposes.").

385. *Id.* at art. 58, para. 2, 21 Int'l Legal Materials at 1280.

386. *See supra* note 283 and accompanying text. It should also be noted that any other position would lead to the anomaly of having the "peaceful purposes" provision apply to the bed of the economic zone and the high seas — reaffirmed by Article 141 — but not to that portion of the continental shelf located between the two. For a similar view, see Treves,

bility to that area as well.

The meaning of "peaceful purposes" in international conventions has long been a matter subject to difference of opinion.[387] Some commentators have suggested that the language is designed to assure that the area to which it applies is used for activities of a nonmilitary nature.[388] Just as ardently, others have maintained that it is directed at nothing more than proscribing activities of an aggressive nature.[389] Both positions were reiterated during the fourth session of UNCLOS III held in New York in the spring of 1976. Specifically, the representative from Ecuador, Mr. Valencia Rodriguez, noted that the term peaceful purposes used in other agreements meant "complete demilitarization and the exclusion . . . of all military activities."[390] Mr. Learson, of the United States, disagreed, stating that the terms "did not, of course, preclude military activities generally," if consistent with the U.N. Charter.[391]

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supra note 19, at 817.

387. "Peaceful purposes" appears in Article 4 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *done* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205, and Article III(1) of the Agreement Governing Activities of States on the Moon and Other Celestial Bodies, U.N. Doc. A/AC.105/L.113/Add.4 (1979), *opened for signature* Dec. 18, 1979, U.N. Doc. A/Res./34/68 (1979). On the meaning of "peaceful purposes" in the context of the Outer Space Treaty of 1967, see Finch, *Outer Space for "Peaceful Purposes"*, 54 A.B.A. J. 365 (1968); Gal, *The Peaceful Uses of Outer Space — After the Space Treaty*, in PROCEEDINGS OF THE TENTH COLLOQUIM ON THE LAW OF OUTER SPACE 129 (1967); Gorove, *Some Thoughts on Article IV of the Outer Space Treaty*, in PROCEEDINGS OF THE THIRTEENTH COLLOQUIM ON THE LAW OF OUTER SPACE 79 (1971); Markoff, *Disarmament and "Peaceful Purposes" Provision in the 1967 Outer Space Treaty*, 4 J. SPACE L. 3 (1976); Meyer, *Interpretation of the Term "Peaceful" in Light of the Space Treaty*, in PROCEEDINGS OF THE ELEVENTH COLLOQUIM ON THE LAW OF OUTER SPACE 27 (1968); Stein, *Legal Restraints in Modern Arms Control Agreements*, 66 AM. J. INT'L L. 255, 260-64 (1972); Zedalis & Wade, *Anti-Satellite Weapons and the Outer Space Treaty of 1967*, 8 CALIF. W. INT'L L.J. 454 (1978); Comment, *The Treaty on Outer Space: An Evaluation of the Arms Control Provisions*, 7 COLUM. J. TRANSNAT'L L. 259 (1968). On the "peaceful purposes" provision appearing in the proposed Moon Treaty of 1979, see Zedalis, *Will Article III of the Moon Treaty Improve Existing Law?: A Textual Analysis*, 5 SUFFOLK TRANSNAT'L L.J. 53 (1980). *See generally* Sullivan, *Antarctica in a Two-Power World*, 36 FOREIGN AFF. 154 (1957); Daniel, *Conflict of Sovereignties in the Antarctic*, 3 Y.B. WORLD AFF. 241 (1949); Hayton, *The "American" Antarctic*, 50 AM. J. INT'L L. 583 (1956); Simsarian, *Inspection Experience Under the Antarctic Treaty and the International Atomic Energy Agency*, 60 AM. J. INT'L L. 502 (1966).

388. *See, e.g.*, Markoff, *Disarmament and "Peaceful Purposes" Provisions in the 1967 Outer Space Treaty of 1967*, 4 J. SPACE L. 3 (1976).

389. *See, e.g.*, Finch, *Outer Space for "Peaceful Purposes"*, 54 A.B.A. J. 365 (1968).

390. *See* 5 UNCLOS III, Off. Rec., *supra* note 278, at 56, para. 2, U.N. Doc. A/Conf.62/SR.67 (1976).

391. *Id.*

Whatever merits or demerits attach to these arguments in other contexts, it seems that "peaceful purposes" applied to the economic zone and the shelf beyond can only be read as prohibiting uses of an aggressive nature. With particular reference to the EEZ, it is clear that Article 58(1)'s clause "referred to in Article 87" signifies that the enumerated high seas freedoms retain their qualitative identity when exercised on the waters or on the bed of the economic zone.[392] Since the freedom to navigate the high seas has long been available to military vessels and is implicitly confirmed by the Convention itself,[393] its listing in Article 58(1) as one of the Article 87 freedoms applicable to the EEZ suggests that the "peaceful purposes" provision must be read as including military uses.[394] Regarding that portion of the shelf extending beyond the outer perimeter of the EEZ, a similar conclusion about military uses in that area can be drawn since that area is directly under the regime of Article 87.[395]

(c) Remedial Action

Foreign state military use of the bed of another state's economic zone or continental shelf involves security considerations. Consequently, it is possible that unilateral coastal state measures directed at the elimination of the use may, in some instances, be permissible. The most obvious case in this category involves the conduct of military maneuvers or the emplacement of military objects producing the kind of violations of the U.N. Charter justifying invocation of the inherent right of self-defense affirmed by Article 51.[396] If the military uses do not prove violative of the Charter,

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392. Oxman, *supra* note 278, at 72.

393. Article 95 of the 1982 Convention on the Law of the Sea states: "*Warships on the high seas* have complete immunity from the jurisdiction of any State other than the flag State." 1982 Convention on Law of the Sea, *supra* note 15, at art. 95, 21 Int'l Legal Materials at 1288 (emphasis added).

394. Admittedly navigation is a freedom exercised on the water surface or in the water column, but it would seem peculiar to argue that this warrants giving "peaceful purposes" one meaning when applied to the waters of the EEZ and another when applied to the bed. This is especially so in view of the fact that the rule of residual competence set forth in Article 59 is, as we have seen, flexible enough to include foreign state military use of any part of the economic zone. *See supra* notes 224-25 and accompanying text.

395. *See generally* comment by Norman A. Wulf, Deputy General Counsel, U.S. Arms Control and Disarmament Agency, 46 L. & Contemp. Probs. 179 (1983), on non-aggressive definition of "peaceful purposes" language in 1982 Convention on Law of the Sea.

396. Article 51 of the U.N. Charter states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of

they may nevertheless have been initiated, or are being continued, in contravention of one or more of the limitations of specific or general applicability discussed above.[397] When we addressed the matter of coastal state remedial action in these circumstances in the context of the 1958 Shelf Convention, avoidance of military confrontation and maintenance of international stability were described as preeminent concerns. Indeed, it was suggested that, with the exception of the situation in which the coastal state could remove military objects without encountering resistance from the foreign state, resort to the peaceful settlement mechanisms provided in Chapter VI of the Charter was an obligatory step in the resolution process. This result was said to proceed from the fact that every other imaginable situation involved a dispute "likely to endanger the maintenance of peace and security," thereby constituting the kind of dispute Article 33 places within the purview of Chapter VI.

Part XV of the 1982 Convention on the Law of the Sea contains its own provisions relating to the settlement of law of the sea disputes. By the terms of its opening stanza, Article 279, Part XV applies to "any dispute . . . concerning the interpretation or application" of the Convention.[398] The Convention considerably extends the peaceful settlement obligation reflected in the Charter, because the Convention does not contain a requirement that the dispute endanger the maintenance of international peace and security. Therefore, the important question is no longer whether removal or termination efforts will meet with resistance or will strengthen or jeopardize international stability. The only relevant matter is whether a dispute exists about the meaning or applicability of a specific provision of the Convention. In this connection, it would appear that detection of foreign state military activities or objects might produce one of the following coastal state reactions: a representation that the Convention was violated which the foreign state denies; a similar representation to which the foreign state responds admitting violation but refusing to take action

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this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.

397. *See supra* Section III(C)(2)(a), (b).

398. 1982 Convention on Law of the Sea, *supra* note 15, at art. 279, 21 Int'l Legal Materials at 1322. Article 279 states:

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

Id.

which would result in the violation's discontinuation; or immediate coastal state action, not preceded by a representation that the Convention was violated, which is directed at termination of the activities or removal of the devices. What can be said about each of these scenarios in light of the language of Article 279?

A coastal state representation of violation communicated to and then denied by a foreign state conducting activities or emplacing military objects in apparent contravention of one of the specific or general limitations mentioned in the 1982 Convention clearly gives rise to a dispute subject to the peaceful settlement procedures of Part XV.[399] The denial, which might take the form of a rejection of either the coastal state's interpretation of an admittedly applicable provision or its assertion that the conduct of the foreign state is within a provision the meaning of which is not in question, creates a dispute "concerning the interpretation or application" of the Convention. Straightforward cases of this sort may not develop very often. In all probability, such situations will arise only when the risks associated with any other course of action incline the coastal state to diplomatic niceties, or when the coastal state chances a representation hoping that it will result in the foreign state ending activities or removing objects viewed as undesirable yet tacitly recognized as not violative of any of the Convention's limitations.[400]

An entirely different case exists, however, if a representation meets with an admission of violation by the foreign state which refuses to take the necessary steps to stop the violation. The motivation underlying such a foreign state response could be coastal state weakness or an assessment that the expressed interest of the coastal state in obtaining a discontinuation of violation is not strong enough to lead it to take measures essential to secure the objective. The basic question regarding Part XV is whether the foreign state is nevertheless obligated to submit to peaceful settlement efforts designed to end the ongoing violation. It may contend that the obligation does not exist because its admission prevents a dispute concerning the meaning or applicability of a provision of the Convention from arising. This is indisputably correct if Article 279's reference to "concerning the interpretation or application of [the] Convention"[401] is read as meaning a dispute about *whether a relevant provision has a particular*

399. *See id.*, Art. 279.

400. Clearly, in the instance of a representation of a violation being advanced by a coastal state unable to otherwise effect removal or termination, viewing a dispute within the terms of Article 279 as in existence seems to comport with reality. *See supra* note 258. There may be no other alternative left for the coastal state.

401. *See supra* note 398.

interpretation or actually applies to the facts at hand. But, there is support for reading the provision as referring to disputes which have *arisen from a particular provision's interpretation and subsequent application to extant facts.* If the latter approach captures the essence of Article 279, foreign state admission of violation would not detract from the obligation to settle the dispute through the mechanisms provided in Part XV.

Interestingly, the Convention's immediate draft predecessor used the much broader reference "relating to" rather than "concerning," when describing the kinds of disputes within the parameters of Part XV.[402] Notwithstanding this, there would seem to be two items militating against accepting the usual interpretative inference drawn from this change in language. First, the change was not accompanied by a reported suggestion that it was intended to have substantive effect. When considered in light of the fact that each draft predecessor of Article 279 — beginning with the ISNT — contained "relating to" and, further, that that reference was changed wherever it occurred in Part XV, the absence of any explanatory suggestion seems quite significant. Second, peaceful settlement cannot be avoided. Violations of specific or general limitations of the Convention which are willingly admitted by the foreign state because of coastal state inability to take responsive action will, in most instances, trigger the resolution mechanisms of Chapter VI of the Charter.[403] In view of the particularity of Part XV and its specific application to disputes involving the law of the sea,[404] it would seem peculiar to apply the procedures of Chapter VI to the states concerned. Indeed, the parties themselves may resist this notion because the Convention provides them with procedures of somewhat greater latitude.[405] The better approach, however, would be to have initial resort made to those provisions of the Convention designed to deal with such matters, leaving the Charter to operate when the procedures of Part XV of the 1982 Convention prove unproductive.

What if in the third alternative above the coastal decides to forego communicating a representation of violation to the foreign state, choosing

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402. *See* Draft Treaty, *supra* note 310, at art. 279, 19 Int'l Legal Materials at 1239. Article 279 states: "The States Parties shall settle any dispute between them relating to the interpretation or application of the Convention in accordance with paragraph 3 of Article 2, and shall seek a solution through the peaceful means indicated in paragraph 1 of Article 33, of the Charter of the United Nations." *Id.*

403. *See supra* text accompanying notes 258 & 265.

404. Adede, *Law of the Sea — The Integration of the System of Settlement of Disputes Under the Draft Convention as a Whole*, 72 AM. J. INT'L L. 84 (1978).

405. Article 286 of the Convention obligates the states concerned to submit to settlement by a court or tribunal. The controlling provision of the Charter, however, would appear to be Article 37(1) and it obligates referral to the United Nations Security Council.

to immediately pursue efforts directed at the elimination of an apparently violative military undertaking? Is it conceivable that the coastal state may prevail if it argues that since it has made no representation of violation no dispute exists, and without a dispute, Part XV does not apply?

More than likely, a situation of this sort will only occur when a foreign state military use has resulted in the emplacement of military objects which, for reasons of secrecy or weakness, are left undefended by foreign state forces. In whatever context it arises, the determinative issue will be the existence or nonexistence of a "dispute." A representation followed either by a denial or an admission coupled with a refusal to end a violation produces a dispute. If no representation is made, perhaps a coastal state's assertion that no dispute exists may be accurate. To conclude from this, however, that the coastal state may thus take action directed at the termination of ongoing military activities or the removal of military objects seems incorrect. After all, although a dispute may not result from an exchange of representations, once the coastal state commences efforts to eliminate a use the foreign state has a strong interest in seeing continued, a dispute would then seem to arise.

As envisioned by Part XV of the Convention, resolution of each of the three preceding situations would initially be sought through the mechanisms set forth in Article 33(1) of the U.N. Charter.[406] It is clear that the Convention does not obligate the states concerned to abide by the results of conciliation efforts.[407] No expression to this effect appears in the Convention with regard to negotiation, enquiry, mediation, and arbitration but the same can probably be said with equal confidence. Passing beyond these more general forms of dispute settlement, Articles 286-296 describe compulsory procedures with binding decisions which come into play whenever the more general procedures prove unproductive.[408] In essence, it is anticipated that parties to the Convention will designate in writing one or more of several listed bodies which will be looked to for resolution assistance, when a dispute within the purview of Part XV arises. Article 290[409] vests the designated bodies with the authority to prescribe provisional measures appropriate under the circumstances, and this procedure

406. *See* 1982 Convention on Law of the Sea, *supra* note 15, at art. 279, 21 Int'l Legal Materials at 1322 (quoted *supra* at note 398).

407. In this connection, see 1982 Convention on Law of the Sea, *supra* note 15, at art. 284, 21 Int'l Legal Materials at 1322, which cross-references Annex V, *id.* at 1344-45. Article 7(2) of Annex V provides: "The report of the [conciliation] commission, including its conclusions or recommendations, shall not be binding upon the parties." *Id.*

408. *Id.* at arts. 286-96, 21 Int'l Legal Materials at 1322-24.

409. *Id.* at art. 290, 21 Int'l Legal Materials at 1323.

is supplemented by Article 296[410] which obligates states' parties to comply with final decisions.

Unfortunately, resort to the procedures of Part XV may not result in a resolution of the dispute. The dispute may be excluded[411] or excepted[412] from the compulsory procedures which entail binding decisions. If the compulsory procedures cannot be avoided, the entire gamut of procedures may be utilized but the state which finds itself on the losing end may flatly refuse to comply with an adverse judgment. In either of these situations, reference to the Security Council under Article 37(1) of the Charter may then be appropriate.[413] The determinative matter under Article 37(1) of the Charter, of course, will concern whether the dispute is likely to endanger the maintenance of international peace and security. Attention must then be shifted from the existence or nonexistence of a representation of violation, to the likelihood of military confrontation and the prospects of preserving international stability.

The discussion of remedial action under the 1958 Shelf Convention revealed five basic fact patterns in which the likelihood of military confrontation and prospects for preserving international stability were addressed. This delineation was made to ascertain the appropriateness of utilization of the dispute settlement procedures set forth in Chapter VI. Those same fact patterns recur here. Furthermore, conclusions associated with each of those patterns under the 1958 Convention seem completely transferable to the determination whether a dispute involving a foreign state military undertaking unable to survive the rigors of the various balancing tests of the 1982 Convention is "likely to endanger the maintenance of international peace and security." If, however, the dispute involves an undertaking which satisfies the balancing tests by virtue of being designed to restore the military balance but proves violative of the 1982 regime because it involves drilling or the use of installations and structures which interfere with the coastal state's economic and resource-related activities, the conclusions would not seem to be completely transferable. In the exceptional cases where coastal state efforts to remove military objects emplaced in violation of Article 60 or Article 81, or terminate ongoing military activities violative of either provision, meet with foreign state resistance, it is clear that the Security Council may

410. *Id.* at art. 296, 21 Int'l Legal Materials at 1324.

411. *See id.* at art. 297, 21 Int'l Legal Materials at 1324.

412. *See id.* at art. 298, 21 Int'l Legal Materials at 1325.

413. Article 37(1) of the U.N. Charter states: "Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council." U.N. CHARTER art. 37, para. 1.

exercise its authority under Article 37(2) and recommend procedures or methods of adjustment or terms of settlement. The possibility of resistance would make the dispute one which is "likely to endanger the maintenance of international peace and security."

A situation involving a coastal state which lacks the ability to undertake removal or termination efforts directed at a military use contravening Article 60 or Article 81 presents an interesting comparison between the 1958 and the 1982 regimes. As described in the discussion of that earlier regime, if the foreign state military use, notwithstanding the inability of the coastal state to take remedial action, created a threat sufficient to prevent it from passing the balancing test, the peaceful settlement obligation of Chapter VI applied.[414] It has already been mentioned that the same result will obtain whenever any of the balancing tests of the 1982 Convention cannot be met. If the problem, however, involves nothing other than a simple violation of the prohibition on drilling or the prohibition on installations and structures, Chapter VI would seem applicable. In order to satisfy the requisites of one of the relevant balancing tests, the foreign state military effort must be designed to restore military parity, meet legitimate security concerns, and bolster international peace and stability. That the military use nevertheless violates one of the Convention's limitations of specific applicability does not transform the dispute into one which is "likely to endanger the maintenance of international peace and security."[415] This may be accomplished by coastal state action directed at termination or removal, but when the coastal state lacks the wherewithal to initiate such action cannot be accomplished by the mere violation of either Article 60 or Article 81.

An entirely different result occurs when the foreign state lacks the ability to resist removal of military objects but asserts that, since the Convention's balancing tests have been satisfied, the objects have been lawfully emplaced. To convince the Security Council of the accuracy of this assertion, the foreign state must have acted to restore military equilibrium and in a manner which strengthens international stability. Under the 1958 regime it was concluded in such cases that the foreign state may trigger the coastal state's obligation under Chapter VI.[416] That same conclusion should apply under the 1982 Convention even if emplacement of the foreign state's objects have violated the limitations on drilling or installations and structures. Coastal state efforts to remove such objects

414. *See supra* text accompanying notes 262-65.
415. This is so because the violation strengthens security.
416. *See supra* notes 266-67.

would threaten the maintenance of international peace and security by posing a risk of resurrecting a military asymmetry. In fashioning its recommended procedures or methods of adjustment or terms of settlement, the Security Council should reflect on this factor and on the violative nature of the foreign state military use.[417]

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417. In most instances, use of the mechanisms established by Chapter VI will produce a resolution of any of the types of disputes noted above. Reference to Security Council enforcement under Articles 41 and 42 of Chapter VII may be required, however, if resolution does not result and a continuation of any of the disputes and accompanying activity are determined to constitute a "threat to the peace, breach of the peace, or act of aggression." Only in the exceptional instance of the intransigent state being a permanent member of the Security Council would reference to Chapter VII perhaps not end the matter. Even in cases of that sort, however, it would seem that the difficult question of whether recourse to unilateral armed force may *then* be had would not require an answer where the coastal state lacks the ability to effect the removal of foreign state military objects or where the foreign state maintains, and subsequently demonstrates, the lawfulness of its military undertakings. In the former situation the reason is obvious, and in the latter it proceeds from the fact that, since the lawfulness of the undertakings will be linked to general military inferiority of the foreign state vis-a-vis the coastal state, resistance requiring the use of force by the coastal state is very improbable. Unless the coastal state considers the foreign state objects or activities so threatening, or the foreign state considers them so essential to its own security as to warrant risking international confrontation, it is unlikely the question of whether recourse to unilateral armed force may be had will ever have to be addressed. The answer to that question, should it have to be addressed, appears somewhat unsettled.

Under customary international law, states were entitled to use force against other states if justified as a reprisal. The elements of justification are stated in the *Naulilaa Incident Arbitration*, 2 U.N. Rep. Int'l Arb. Awards 1012 (Portuguese-German Arbitral Tribunal, 1928), as being: (1) a previous or ongoing violation of international law by one state affecting another; (2) an unsuccessful effort to redress the matter by peaceful means; and (3) a reprisal which is reasonably proportionate to the legal wrong suffered. Under customary international law, the use of force as a legitimate reprisal was approved in instances where dictated by necessity. Assuming that these elements were satisfied, it would appear customary international law would authorize the use of force directed at the removal of objects or the termination of activities. Customary international law, however, is not the only consideration. Many have argued that Articles 2(4) and 51 of the U.N. Charter signify that the customary law right has been eliminated and that the use of force is justified only when undertaken in self-defense. *See* D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 154-55 (1958); I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 265-68 (1963); R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 217-18 (1963); M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 142-43, 207-08 (1952); Fitzmaurice, *The General Principles of International Law — Considered From the Standpoint of the Rule of Law* 92 [II] RECUEIL DES COURS 5, 171 (1957). Some have even stood by this view after acknowledging that the absence of law-enforcing power in the United Nations may allow violations of international law that do not justify the use of force in self-defense to go unpunished. *See* Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 4-6 (1956). This view is rationalized as compelled by the "overwhelming common interest in basic order, and the exorbitant potential costs of exercises of force by contemporary weapons." *See* M. MCDOUGAL & F.

IV. MILITARY ASSESSMENT

The kinds of military uses which a foreign state might be interested in undertaking on another state's continental shelf are limited only by available technology. The uses of most immediate concern, however, relate to the emplacement of detection devices, weapons, and other military objects employed in modern ASW. This results from the position of the United States, one of the two superpowers, which must rely heavily on the deterrence potential of its ballistic missile launching submarines while pursuing efforts to enhance the survivability of its imperiled land-based ICBM force.

In assessing the military acceptability of the essentially proscriptive regime described in the preceding pages — a regime which prohibits foreign state military use in all but the most extreme situations — one must be sensitive to the degree of dependence of the superpowers upon their respective SLBM forces, the missions and capabilities of their respective submarine fleets, the extent to which geography has resulted in disparities, and finally, the advantages or disadvantages, on a comparative basis, of opting for an alternative legal regime. With respect to the first, recent indications suggest that with the number of strategic warheads on both the American and the Soviet side in the vicinity of 10,000[418] basing preferences differ quite markedly. The United States has deployed slightly more than 50 percent of its strategic warheads on SLBMs, with less than 30 percent on bombers and about 20 percent on ICBMs.[419] The Soviet Union, on the other hand, depends extensively on ICBMs, which carry a little over 70 percent of all its strategic warheads. Less than 20 percent of its warheads are based on SLBMs and less than 10 percent on bombers.[420] The significantly large percentage of Soviet warheads based on ICBMs has contributed to the vulnerability of the United States ICBM force.[421]

FELICIANO, *supra*, at 208. Based on various interpretations of the language of Article 2(4), others have arrived at a different position. *See* C. COLBERT, RETALIATION IN INTERNATIONAL LAW 203 (1948). *Cf.* J. STONE, AGGRESSION AND WORLD ORDER 44, 94-98 (1958); D. BOWETT, *supra*, at 155 (noting "doubts as to the continued legality of forms of self-help"). One way to reconcile the conflicting approaches is to view what is permitted in the name of self-defense in a flexible manner. *See* M. MCDOUGAL & F. FELICIANO, *supra*, at 1-260, 679-89. Another approach would be to maintain the importance of construing Article 2(4) in a manner which comports with the conduct states are generally expected to engage in.

418. Frye, *Strategic Build-Down: A Context for Restraint*, 62 FOREIGN AFF. 293, 296 (1983-1984).

419. *Id.*

420. *Id.*

421. *Id.*

Additionally, the large Soviet percentage reveals an obvious difference in degree of dependence of the two nations on SLBMs to deter strategic conflict or nuclear gamesmanship.

The missions and capabilities of the ballistic missile launching and attack submarines comprising the undersea fleets of the United States and the Soviet Union are in some areas similar and in other areas as different as the countries' dependence on SLBMs. The most conspicuous similarity relates to ballistic missile launching submarines. On both sides, they operate to perform the mission of strategic deterrence by maintaining a nuclear reserve able to strike urban-industrial centers and other "soft" targets in retaliation for attacks on ICBMs silos.[422] Slightly less conspicuous, the attack submarines of both nations — whether nuclear powered SSNs or diesel powered conventional submarines — seek to destroy the opponent's ballistic missile launching submarines before they can reach a target acquisition destination and seek to insulate their own ballistic missile launching submarines against similar efforts of the opponent. There is a clear difference, however, in the tactical mission of sea control. Soviet attack submarines are poised to deny United States naval forces free use of the oceans by cutting sea lines of communication.[423] United States attack submarines, on the other hand, are ready to be called upon to assert sea control by hunting and killing Soviet attack submarines before they can successfully cut off communication. While the United States does maintain a formidable denial capability,[424] the difference in mission objectives can be accounted for by the comparative locations of the United States and the Soviet Union in relation to the Eurasian land-mass. During a period of confrontation, the Soviets can use inland routes to transport and supply their armed forces. The United States, on the other hand, will be forced to use sea routes to perform the same tasks.

Looking at the capabilities of the respective submarine fleets the following facts appear. The United States currently operates 95 attack submarines, most of which are SSNs,[425] and 33 ballistic missile launching submarines, of which 31 are Poseidon SSBNs and 2 are Ohio-class Trident

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422. *See* HOUSE COMM. ON INT'L RELATIONS, 95TH CONG., 2D SESS., EVALUATION OF FISCAL YEAR 1979 ARMS CONTROL IMPACT STATEMENTS: TOWARDS MORE INFORMED CONGRESSIONAL PARTICIPATION IN NATIONAL SECURITY POLICYMAKING 64 (Comm. Print 1979) [hereinafter cited as ACIS 1979]. Note, however, that a counter-silo capable SLBM force may be developed by the late 1980's or early 1990's. *Id.*

423. *See* Weinland, *The State and Future of the Soviet Navy in the North Atlantic*, in NEW STRATEGIC FACTORS, *supra* note 19, at 55, 66.

424. *See* Turner, *The Naval Balance: Not Just A Numbers Game*, 55 FOREIGN AFF. 339, 342-44 (1977).

425. Allen & Polmar, *supra* note 2.

SSBNs.[426] The 2 Trident SSBNs carry a total of 48 Trident I (C-4) nuclear missiles[427] armed with eight warheads apiece.[428] Each missile has a range of about 4,000 nautical miles.[429] All 31 Poseidon SSBNs carry 16 missiles apiece.[430] Of the 31, 12 have been retro-fitted to carry a total of 192 Trident I (C-4) nuclear missiles[431] which pushes the total number of warheads on Trident missiles to 1,920.[432] The remaining 19 Poseidons are armed with a total of 304 Poseidon (C-3) nuclear missiles[433] carrying 10 warheads each,[434] thus placing the total number of SLBM warheads at 4,960.[435] The Poseidon C-3s have a range limitation of about 2,500 nautical miles.[436]

The Soviet Union operates 280 attack submarines,[437] a large number of which are diesel powered,[438] and 62 modern ballistic missile launching submarines.[439] Of the 62, there are 23 Yankee-class SSBNs;[440] each is able to carry 16 SS-N-6 missiles.[441] As best as can be determined, only 17 of the Y-class SSBNs carry the dual warhead SS-N-6; the balance have the

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426. Stockholm Int'l Peace Research Inst., Yearbook of World Armaments and Disarmament: 1983, 48 table 3.1 53 (1983) [hereinafter cited as SIPRI 1983]; Allen & Polmar, *supra* note 2, at 12 (fixing the total United States SSBN fleet at 34).

427. SIPRI 1983, *supra* note 426, at 53.

428. *Id.* at 48, table 3.1.

429. *See* SENATE COMM. ON FOREIGN RELATIONS AND HOUSE COMM. ON FOREIGN AFFAIRS, 96TH CONG., 1ST SESS., Fiscal Year 1980 Arms Control Impact Statements 46 (Joint Comm. Print 1979) [hereinafter cited as ACIS 1980].

430. SIPRI 1983, *supra* note 426, at 53.

431. *Id.*

432. *Id.* at 48, table 3.1.

433. *Id.* at 53.

434. *Id.* at 48, table 3.1.

435. *Id.*

436. *See* Lindsey, *The Future of Anti-Submarine Warfare and Its Impact on Naval Activities in the North Atlantic*, in NEW STRATEGIC FACTORS, *supra* note 19, at 139, 150.

437. Allen & Polmar, *supra* note 2, at 12.

438. In 1977 it was reported that 178 of the Soviet's 250 attack submarines were diesel powered, the remainder being SSNs. *See* Karber & Lellenberg, *The State and Future of U.S. Naval Forces in the North Atlantic*, in NEW STRATEGIC FACTORS, *supra* note 19, at 30, 31 figure 1.

439. SIPRI 1983, *supra* note 426, at 57. In 1982 it was reported that an additional nine older version ballistic missile submarines were being operated. *See* STOCKHOLM INT'L PEACE RESEARCH INST., YEARBOOK OF WORLD ARMAMENTS AND DISARMAMENT: 1982, 276-77, app. 7A (1982) [hereinafter cited as SIPRI 1982].

440. SIPRI 1982, *supra* note 439, at 276, app. 7A.

441. *Id.* The words "able to carry" were deliberately used. Given that the 23 Y-class SSBNs are reported to have 16 SS-N-6 tubes apiece, they might carry a total of 368 missiles. Since SIPRI 1982 also reported that one Hotel III class SSBN had 6 SS-N-6 tubes, the total of SS-N-6 missiles in the Soviet arsenal should be 374. That was the figure reported by SIPRI 1982 for SS-N-6 and SS-N-6 MRV, *id.*, but SIPRI 1983, *supra* note 426, at 49, table 3.2, reports 358. This suggests one Y-class SSBN may not be armed. Undoubtedly it is kept in port.

single warhead version.[442] Coupling these figures with the booster capability of the SS-N-6, the Y-class SSBNs should be able to deliver 646 warheads[443] to targets between 1,300-1,600 nautical miles in distance.[444] Rounding out the total number of modern nuclear powered ballistic missile launching submarines operated by the Soviet Union are 1 Yankee II (Y-II) class,[445] 18 Delta I (D-I) class,[446] 4 Delta II (D-II) class,[447] and 16 Delta III (D-III) class SSBNs.[448] The Y-II class SSBN carries 12 SS-N-17 missiles,[449] each armed with a single warhead[450] and having a range of 2,500 nautical miles.[451] The D-I and D-II class SSBNs both carry the single warhead SS-N-8,[452] which has a 4,300 nautical mile range;[453] each D-I can be armed with 12 missiles[454] and each D-II with 16.[455] Pushing the total possible number of warheads deliverable by modern Soviet SSBNs to 2,730 are the 16 D-III class submarines able to carry 16[456] SS-N-18 missiles[457] apiece; each missile is armed with 7 warheads[458] and has a range limitation of 4,050 nautical miles.[459]. Once the newest Soviet SSBN — the Typhoon — becomes fully operational,[460] the total possible number of warheads deliverable should be increased by 200. The Typhoon is able to carry 20 SS-NX-20 SLBMs[461] with 10 warheads apiece[462] to targets

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442. SIPRI 1982 reported that 23 Y-class and one Hotel III class SSBNs carry SS-N-6 missiles. SIPRI 1982, *supra* note 439, at 276, app. 7A. It also reported that there were 102 SS-N-6s and 272 SS-N-6 MRVs. *Id.* at 277, app. 7A. Since the Hotel III class SSBN and six Y-class SSBNs together could carry the 102 SS-N-6s, the other 17 Y-class SSBNs must carry the multiple warhead SS-N-6.

443. This figure is based on 102 single warheads SS-N-6s and 272 dual warhead SS-N-6s as reported SIPRI 1982. *See supra* note 442. *But see* SIPRI 1983, *supra* note 426, at 49, table 3.2 (reporting a total of 614).

444. SIPRI 1982, *supra* note 439, at 277, app. 7A.

445. *Id.* at 276.

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. SIPRI 1983, *supra* note 426, at 48, table 3.2.

451. *See* T. DUPUY, G. HAYES & J. ANDREWS, THE ALMANAC OF WORLD NAVAL POWER 335 (4th ed. 1980).

452. SIPRI 1982, *supra* note 439, at 276, app. 7A.

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id*

457. *Id.*

458. SIPRI 1983, *supra* note 426, at 49, table 3.2.

459. SIPRI 1982, *supra* note 439, at 277, app. 7A.

460. U.S. DEP'T OF DEFENSE, SOVIET MILITARY POWER 7 (1983) (reporting that one Typhoon was being placed on duty).

461. SIPRI 1983, *supra* note 426, at 57.

462. *Id.* at 49, table 3.2.

approximately 4,200 nautical miles[463] from launch location.[464]

In 1977 it was estimated that approximately 70 percent of the Soviet Union's SSBN force was stationed with the Northern Fleet in Murmansk/Polyarnyy on the Kola Peninsula above Scandinavia.[465] Recent information from the Department of Defense, however, notes that about 14 Delta- and 10 Yankee-class SSBNs are stationed with the Pacific Fleet at both Vladivostok, north of Korea, and the Siberian Port of Petropavlovsk, on the Pacific side of the Kamchatka Peninsula.[466] Relying upon the figures above, 24 Delta- and 14 Yankee-class SSBNs[467] — with 1 Typhoon-class coming on-line — are left for location with the Northern Fleet. Obviously, this means there has been a slight reduction in the percentage of the Soviet SSBN force stationed with the Northern Fleet. By contrast, the United States' SSBN force is predominantly an Atlantic fleet. Specifically, the 31 Poseidons are stationed at Charleston, South Carolina and 1 Trident is stationed at Kings Bay, Georgia.[468] The second Trident is located at Bangor, Washington.[469] From all indications, most of the Trident force will ultimately be based on the Pacific side of the continental United States.[470]

Geographical disparities have been utilized by the United States to the disadvantage of the Soviet Union. As the darkened blocks on Appendix No.1 indicate, long-range acoustic devices (and perhaps other military objects as well) have been deployed in the passages between Bear Island and the northern coast of Norway; between Greenland, Iceland, and the southwestern shore of Spain; between Newfoundland, the Azores, and the southwestern shore of Spain; around Gibraltar; along the Aleutian Island chain and the Kurile Basin to the northern shore of Japan; and between Japan and South Korea.[471] The result has been that no Soviet submarine entering the Atlantic from Murmansk/Polyarnyy is able to escape detection.[472] Presumably, the same can be said about those submarines

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463. *Id.* at 57 (8300 kilometers).

464. The total number of warheads has been reported at 2,813. SIPRI 1983, *supra* note 426, at 49. The 2,730 figure is an estimate based on SIPRI 1982 figures, designed to reflect what the Soviets *could* deliver given the number of SSBNs, the number of missile tubes on each SSBN, and current multiple reentry vehicle capability.

465. Holst, *The Strategic Importance of the North Atlantic: Some Questions for the Future*, in NEW STRATEGIC FACTORS, *supra* note 19, at 169.

466. *See* U.S. Dep't of Defense, *supra* note 460, at 22.

467. *Id.* (fixing total number of Yankee Class SSBNs with Northern Fleet at 15).

468. *See id.*

469. *Id.*

470. *See* ACIS 1980, *supra* note 429, at 44-45.

471. *See* ACIS 1979, *supra* note 422, at 110.

472. *Id.*

stationed in Vladivostok and Petropavlovsk which leave home port for a patrol location in the Pacific.[473] The absence of comparable passage zones along the coasts of the United States has meant that Soviet ASW efforts have been confined to specific point oriented activities, leaving United States ballistic missile launching nuclear submarines with unimpeded open-access to the protective security of the deep ocean.[474]

The cone-shaped figures on Appendix No. 1 indicate the portions of the United States which Soviet SS-N-8s, SS-N-18s, and SS-NX-20s could hit if launched from, respectively, the D-I and II, D-III, and Typhoon-class SSBNs sitting in the safety of home port at Murmansk/Polyarnyy or Petropavlovsk. These figures reflect a range of 4,200 nautical miles. Missiles with such a range would be unable to reach the United States if launched from the safety of Vladivostok. Clearly, the shorter range SS-N-6s and SS-N-17s would be unable to reach the United States from any of the Soviet SSBN bases.

Appendix No. 2, a polar projection map which pictures the world from an imaginary vantage point situated high above the North Pole, reflects the same features as Appendix No. 1. The darkened blocks indicate the location of the United States' ASW network and the cone-shaped figures indicate the portions of the United States which the longest range Soviet SLBMs could hit if launched from Murmansk/Polyarnyy or Petropavlovsk. Unlike Appendix No. 1, however, Appendix No. 2 eliminates the distortion in both the distance and in the course which missiles launched from such locations would travel in order to reach targets in the United States. Therefore, it presents a significantly more accurate view. Missiles launched from Petropavlovsk could reach targets only in the northwestern one-quarter of the continental United States. Those from Murmansk/Polyarnyy could cover only the northernmost one-quarter of the contiguous forty-eight states. Even if a complementary launch from both locations were to be undertaken, two-thirds of the United States would fall beyond range, including the southwest, midwest, and southeast.

Operating on the same premise, Appendix No. 3 indicates those portions of the Soviet Union which come within range of the 4,000 nautical mile Trident I (C-4) missiles stationed aboard the Ohio-class Trident submarine in Bangor, Washington. The C-4 missiles stationed aboard the other Ohio-class Trident submarine located in Kings Bay, Georgia, as well as those aboard 12 of the 31 Poseidon SSBNs in Charleston, South

473. *See id.* at 104, 114 (submarines from Petropavlovsk have open access to deep sea, but submarines must still transit areas monitored by United States Navy).

474. *Id.* at 104.

Carolina, cannot reach the Soviet Union from the safety of home port. The Poseidon C-3 missiles aboard the other 19 Poseidon SSBNs would be unable to reach anything more than the northeasternmost tip of Siberia, even if moved to the United States' forward-most base in the Pacific Northwest. Clearly, the longest range missiles would subject only the northeastern one-third of the Soviet Union to attack. The heavily populated and more industrialized south and southwestern portions of the country would escape the direct effects of an SLBM exchange.

For United States submarine launched ballistic missiles to obtain full coverage of Soviet land territory, the SSBNs carrying them must leave home port, cross the continental shelf, and sail to the high seas beyond. Soviet SSBNs that are capable of launching missiles against United States targets must do the same. Appendix No. 2 illustrates by asterisks some possible launch locations for the longest range SLBMs operational in the Soviet Union. Possible launch locations for the longest range United States SLBMs are illustrated on Appendix No. 3 in a similar fashion. Bearing in mind the general location of these launching sites, is it possible that there may be some merit to an argument that a regime permitting foreign state military use of another state's continental shelf would be just as acceptable as the proscriptive regime discussed at great length above? If each superpower is entitled to use the other's shelf for the establishment of an ASW network capable of detecting and, if necessary, destroying the other's SSBNs before they are able to reach appropriate target acquisition destinations, does not the opportunity to one state simply counterbalance the opportunity to the other?

This line of reasoning overlooks one terribly important and determinative fact. In order for United States SSBNs to reach full coverage launch locations, they currently need not transit any Soviet ASW network. Soviet SSBNs, however, cannot reach the regularly used patrol locations — reflected on Appendix No. 2 by the crisscross figures in the Atlantic and Pacific[475] — and bring all the United States within range of their SLBMs without passing through the extensive ASW network operated by the United States and its Allies. Therefore, if one were to take the position that the most acceptable international legal regime is one which permits each of the superpowers to use the other's shelf for military purposes, the Soviets would be benefitted and the United States disadvantaged. If the Soviets availed themselves of their international legal right by establishing an ASW network on the continental shelf extending off each of the three coasts of the United States, they would enhance their strategic position by

475. *See* U.S. DEP'T OF DEFENSE, SOVIET MILITARY POWER 84-85 (1982).

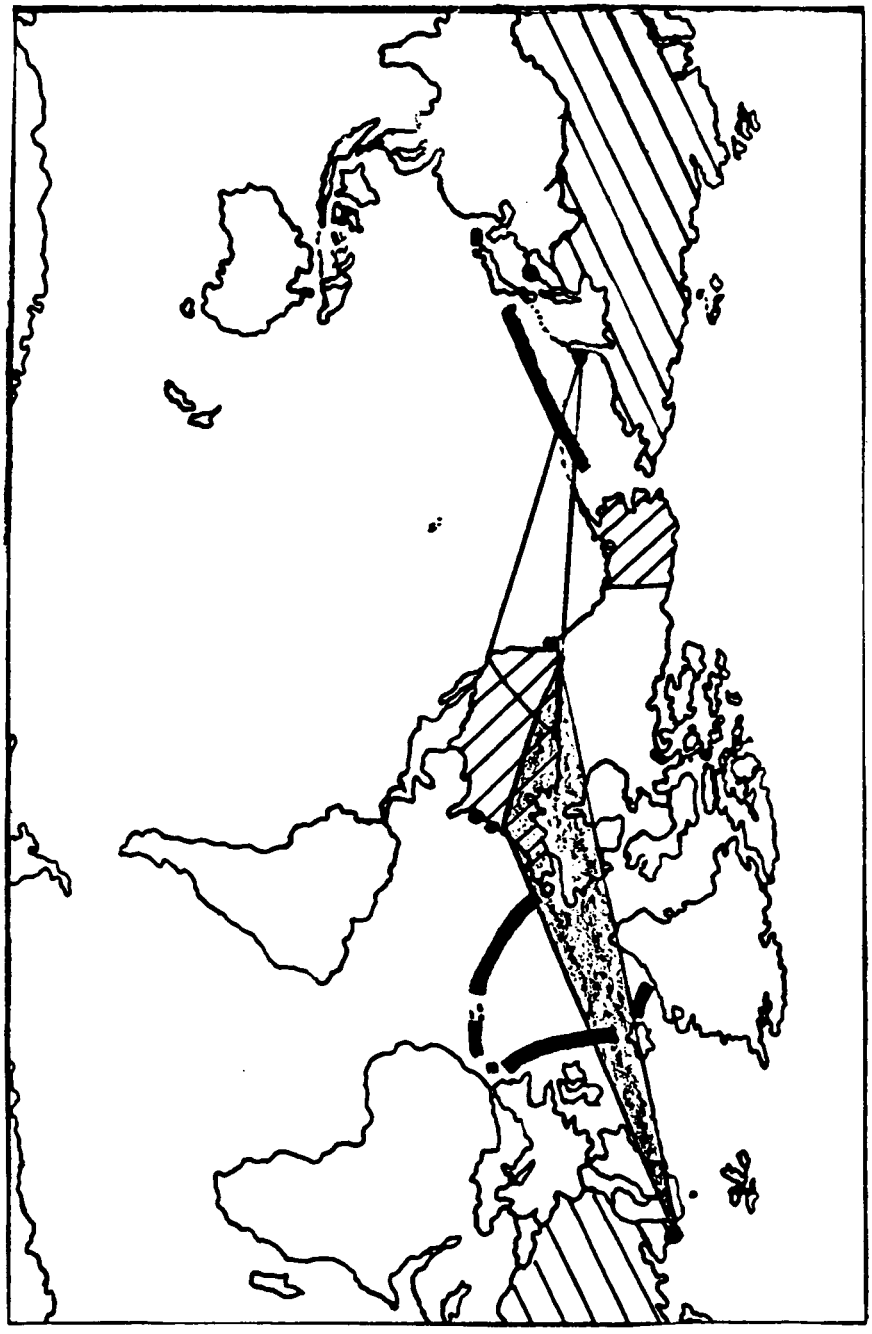
adding the United States' SLBMs to the list of jeopardized weapons, which already includes the United States' land-based ICBM force. The consequences for world order might well prove untoward. It is irrelevant that the United States would have an equally legitimate claim to move its existing ASW network further landward. Soviet SSBNs are already subject to the threat posed by the United States' ASW network since they cannot reach full coverage launch locations without passing the barrier established by that network.

One cannot ignore the fact that approximately 55 percent of the United States' SSBNs, as opposed to about 15 percent of the Soviet Union's SSBNs, are on patrol at any one time.[476] This presents much more than just a perceptible increase in the coverage United States SLBMs have of Soviet territory. Theoretically, ballistic missiles aboard SSBNs on patrol could be coupled with those held in the safety of home port and, if launched from appropriate locations, used to provide full coverage of all Soviet targets. This should not enhance, however, the acceptability of a permissive regime. As alluded to earlier, SLBMs are designed for use against urban-industrial centers and are thus second-strike weapons.[477] Of necessity, then, they are held in reserve and therefore become subject to destruction by SSNs during the intervening period between reciprocal land-based ICBM strikes and the kind of counterforce damage assessment that would warrant a directive which would result in the SLBMs being launched. Any regime permitting the Soviets to establish an ASW network, even though the network is capable only of detecting United States submarines crossing the continental shelf while steaming from home port to the deep ocean, would increase the chances of Soviet SSNs immediately picking up and trailing those carrying SLBMs. This change would place United States SSBNs in greater jeopardy than they now face and might well further erode the strategic balance.

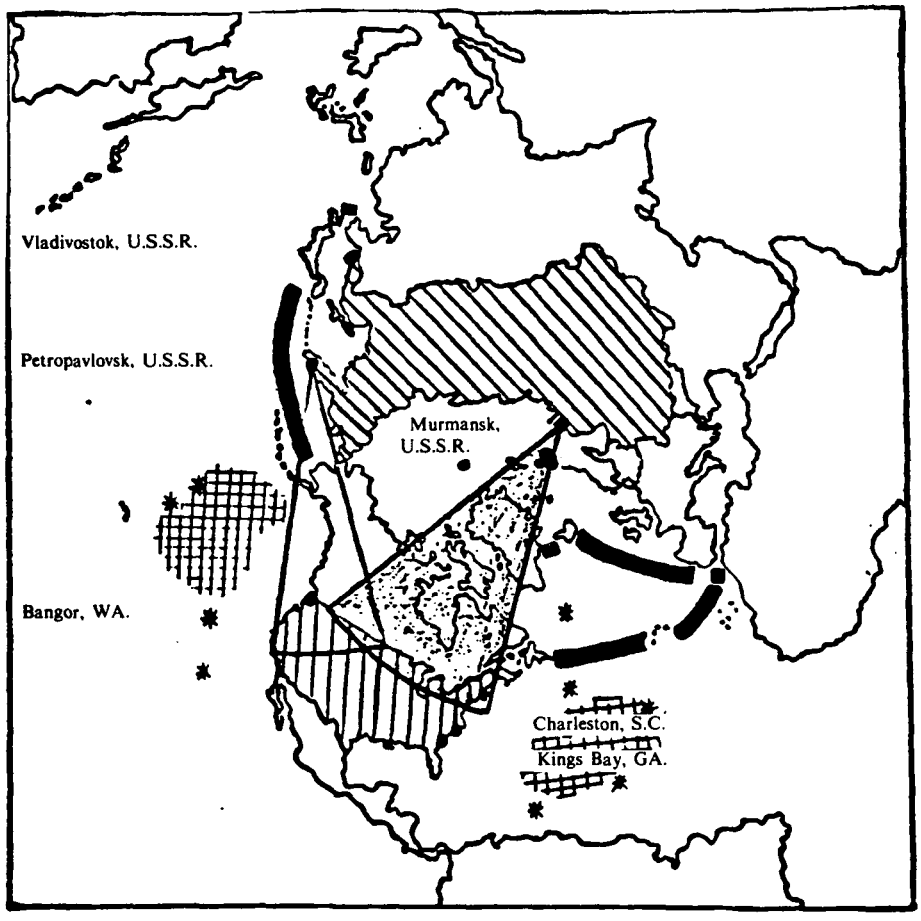
476. ACIS 1979, *supra* note 422, at 104.

477. *See* Ball, *The Counterforce Potential of American SLBM Systems*, 1 J. PEACE RESEARCH 23 (1977); ACIS 1979, *supra* note 422, at 64.

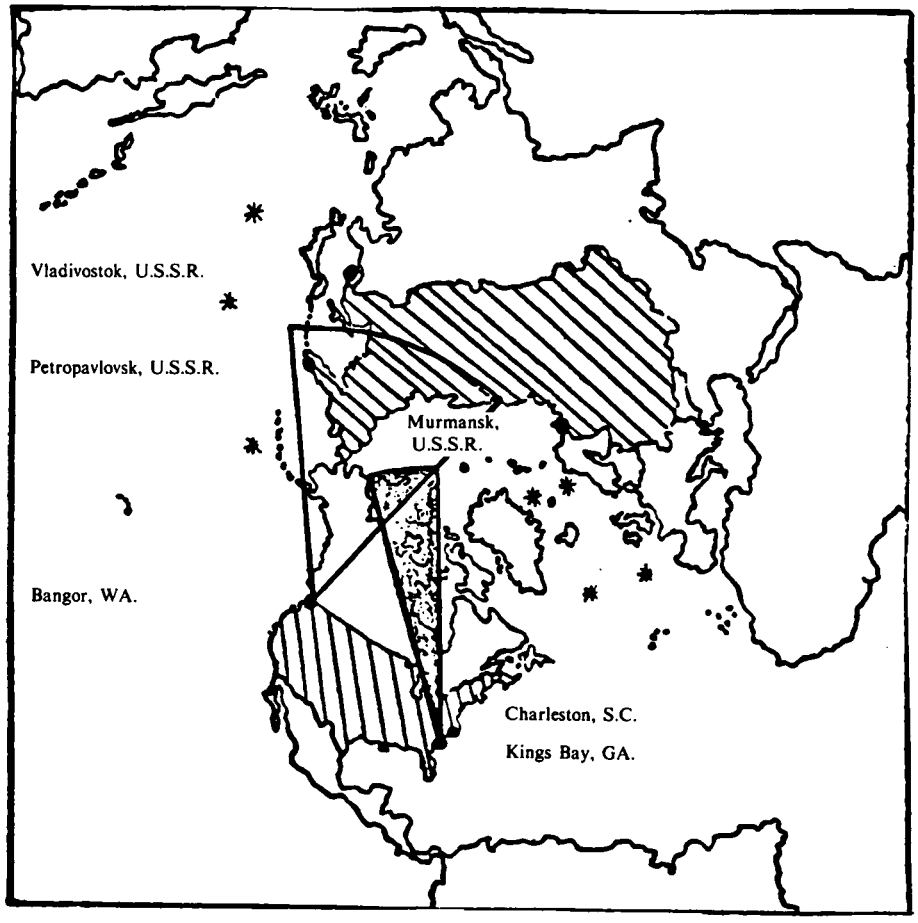
APPENDIX 1



APPENDIX 2


Vladivostok, U.S.S.R.
Petropavlovsk, U.S.S.R.
Murmansk, U.S.S.R.
Bangor, WA.
Charleston, S.C.
Kings Bay, GA.

APPENDIX 3


Vladivostok, U.S.S.R.
Petropavlovsk, U.S.S.R.
Murmansk, U.S.S.R.
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RUTGERS LAW JOURNAL

Volume 16 Fall 1984 Number 1